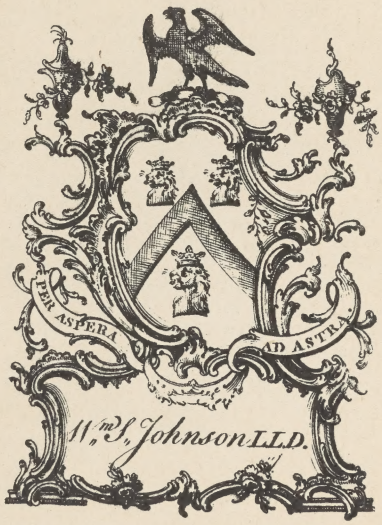
PER ASPERA
AD ASTRA
Wm. S. Johnson LL.D.

Manuscript notes of law lecture courses

Municipal Law.

by Judge Gould.

Municipal Law is defined to be a rule of civil conduct, prescribed by the supreme power of the State, commanding what is right, & prohibiting what is wrong.

It is a rule of civil conduct, for it regards those rights which arise out a state of civil society.

This rule it is said, to correspond with the deffinition, must be permanent, uniform & universal. That it should be permanent means merely, that it shd not be occasional or prescribed for the time being, but shd be to continue, for either some particular or indeffinite time.

It must be universal. This does not mean that it is to extend thro out the realm, for were this the case there cd be no local laws or customs. But it is to be universal within its own certain limits, i.e. it must be gen'l & not pec within its own limits for if it was taken in its extent there could be no such thing as local Laws or Customs 1 Bl 44.

There is a difference between the Natural & Municipal Law in this, that the former is a rule of Moral conduct, the latter of civil conduct 1 Bl 45.

The deffin requires the Rule to be prescribed that is promulgated before it takes effect. To answer this no Law ought to be retroactive, tho in point of fact much of the written Law, is made thus retroactive.

Municipal Law. A Retrospective Law is not of course an Ex post facto Law, but it is one wh. properly has a reference to some act which is passed

An Ex post facto Law is a penal Law extending to some act that is past. Therefore an ex post facto, is a species whereof a Retrospective is the genus, The definition prohibits both retrospective Ex post facto Laws, as them well explained in 3 Dall 386, 391, 1 Bl 46

This distinction is a very important one for this country, for ex post facto laws are prohibited by the constitution of the U.S. but retrospective laws may be made

This rule must be prescribed by the supreme power of the State. By this power in every state is meant the supreme Legislature, for the power of making Laws wh involves also the power of repealing, is the highest in civil society, & indeed this power of making Laws swallows up every other & of course every other power in the community is subservient to it, 1 Bl 46, 90

In pursuing this title it is not my intention to dwell, as formerly on those rules wh are merely elementary, for it would be a waste of time

Interpretation of Laws. on this subject there are many rules which are merely elementary, & are to be found in elementary treatises & perhaps better explained than I could recall to explain them, in the system I am pursuing, and see Bl.

With respect to the interpretation of Laws there are many rules which

Mun. Law &c are prescribed to assist the mind in making the discovery of what was the will & intent of the Law giver & the meaning of the Law.

(1st Rule) The Words of the Law are to be understood generally according to the most known most usual & popular signification, for these commend themselves to the common understandings of every body, the popular meaning of terms & phrases, is the true meaning & if this was not the case, many of the people would not know what the Law meant & so would be entrapped by them.

Terms of Art are to be understood according to their acceptation among the learned of that Art. - & if they are not so understood they cant be understood at all - for they usually have no other meaning.

If the Legislature in making their Laws use the technical terms of the C.L., these terms are to be construed according to their technical C.L. import. Thus, if the Statute use terms "to a man & his heirs" or "to a man & his issue" we must look to the C.L. for their meaning - & this is an unalterable rule 10 Rl 59, 60. 4 Ba & Ald 647. 6 Mod 143.

The same Rules apply to the construction of Contracts. 1 Pow. Cons 402.

2d. Words that are dubious are to be construed by a reference to the context. The signification of a word may often be discovered by a reference to the rest of the sentence wherein otherwise it could not be understood.

And for the same reason reference may often be had to the Preamble, - which is not a part of the Law but as it shews the intent of the Legislature it may be resorted to with propriety.

And for the same reason it is useful to consider

Mun[l] Law } compare the Law in question with other Laws relating to the same subject, 1 Bl. Com. 59, 1 Bro. 365. 3 Dall 175. 4 Ba 645. 9 Lond 206.

3[d] Words are always to be understood as having a reference to the subject matter of the Law, there are many words in our lang. & probably in every other, that have very diff[t] significations when applied to diff[t] subjects 1 Bl 60.

4[th] The effects and consequences of Words & diff[t] constructions are to be regarded, & when one interpretation of a word is absd & unreasonable & another the contrary, the latter must undoubtedly be taken 4 Ba 152. 1 Mod 44. 1 Bl 61.

5[th] The last rule & which is instar omnium is, that the reason & spirit of the Law is to be consulted. Indeed the reason & spirit of the Law constitutes its meaning, with the single exception of Crim. Laws, but in all other cases this forms the true construction, & the object of all the foregoing rules is to attain this object 9 Lond 232 — 4 Ba 647. 1 Bl 61.

From this last rule, wh I repeat is the great cardinal rule in all cases, arises what is called the Equity of the Law, the word "Equity" in this case is used in a sense wh is appropriate, but is not its usual sense, & it means "a construction according to the reason & spirit of the Law" & not according to the moral equity — but I think the word is unfortunately in this case, & case is said to be within the equity of the Law when it is with it reason & spirit, 1 Just 24 b. 1 Bl 52. 3 Bl 431.

Munic[l] Law ℥ Munic[l] Law is divided into two branches the Lex scripta & Lex non scripta.

The Lex non scripta or unwritten Law includes 1st the GL properly so called, or gen[l] customs, 2[d] particular customs & 3[d] particular laws observed in particular jurisdictions. not observed in confined to parti. customs or certain limits but to particular Cts.

The unwritten Law of every country is founded in custom i.e. in gen[l] usage & adoption. 1 Bl 63. 67.

¶ It is called Unwritten Law because its origl institution is not set down in writting like Sts &c. – it does not receive its authority like the St from the solemnity of writing in the roll or the parchment, it is derived from usage or as it is said, "from time whereof the memory of man runneth not to the contrary"

Now an act of the Legisla[r] is set down in writing & the Roll of the Legisl[r] is the evid[e] of Law, & what writing inserts is not to be contradicted in any case – Locus with the unwritten Law. 1 Bl 64. 67.

The Common Law is, nothing more than a customary rule of civil conduct prevailing over a whole country, & is a gen[l] custom, or a rule of Law founded on custom.

It seemes to be called "common" because it is com[n] to the whole community, & not confined to particular districts – the Saxon to be the origin of its name 1 Bl 67. 71.

I observe by the way that the C.L. & Unwritten Law are not synonymous, tho they are often confounded – The C.L. is a branch of the U.L, the U.L. is much extensive

Municipal Law is ~~C.L.~~ C.L. is unwritten, but all U.L. is not common Law.

The C.L. like all U.L. Depends for its ~~authority~~ on universal usage & universal acceptance from time immemorial.

As to what is "immemorial". It must extend back beyond the time of Legal memory. This is universal, to the laws of every country. But in Eng. that Law & that Law only is binding which extends back to the accession of Rich 1st to the throne of Eng. But this ~~law~~ does not apply in this country, & can not in the nature of things apply to any other community. It does not at Law extend back in point of date to 1st period. 1 Bl 68. 2 Bl 31, 2 Roll 269. 2 Inst 136-7.

To one wholly unacquainted with the U.L. the enquiry would arise, where are we to look for the C.L.? It was not originally set down in writing, but it is to be found in the Records of Cts, in Books of Reports & in the Treatises of those who are versed in the Law. And this is to be ~~ascertained~~ ascertained & ascertained by those who are Judges of the Cts of Justice 1 Bl 63. 64. 69.

These Records. Reports & Treatises, are only evidence of what the Law is, & not the Law itself. - for if a decision of a Ct was constitutive, the Law itself, it could never be overruled except by the Legislature, - but we find that Cts often overrule the decisions of each other. And when it is said the C.L. is to be found in the Reports &c it is meant only that these Books are prima facie evidence of this Law. 1 Bl 70.

They are prima facie for if they conclusive evidence, they'd

Muni. Land. Mun. L } never be rebutted,

A Precedent is a former decision on the point in question & is evidence & only evidence of what the Law is.

It is a Rule which I believe is now acknowledged by all Lawyers, that Precedent is to be followed, unless it be absurd or unjust

A Precedent is not to be overruled because the reason of the decision is not readily discovered, but it is authoritative & binding. It must govern unless it be shewn to be absurd or unjust, & the onus probandi lies on him who will set it aside. It is as much importance to obey these precedents as the injunctions of the Legislature, for without this there could be no uniform system of jurisprudence — & this I take to be the opinion of the Bar throughout this country, tho' a diff. was formerly held at the close of the Revolution. 1 Bl 69. 70. 1 East 195.

I observed that the C.L. is theoretically founded on immemorial usage, a time out of mind. The enquiry may then arise — how came the C.L. into existence, & how did it commence? for it must have had a beginning. The truth is the C.L. is built up by the Cts of justice.

There must be a system of jurisprudence ere built up or there could be no proper dispensation of Justice, for no Statute was made which could reach all the cases which might arise under it.

But it may be said, If built up as it is not be made by the Sup. power. The answer is, it is acquiesced in & sanctioned by the sup. power. & this is the only way the

M.L.

Civil Law C L ; Unwritten Law can be made by the supreme power & it is a mere fiction that things it is considered as being prescribed by that power

Indeed many entire branches of the C L have been made since the time of legal memory, such is the case with the title of Legal Devises, & also the codes of Ld & Scotland both which were probably as unknown at the time of Rich 1st as any of modern discoveries in Chymestry — how how can this be according with the definitions. It is true the Cts merely promulgate these things, & the decisions are mere evidence of what the Law is, & always was, or would have been had the question arose in the time of Rich 1st

III The second branch of the Lex non-scripta, is Particular Customs.
These are distinguished from the Gnl customs or C L. in this, that they are confined to particular districts, & are local usages extending over certain local limits & not over the whole country like the C L. - they are such as the customs of London - of Gavelkind, & Borough English & are binding on all subjects who come within these limits 1 Bl 74. 2 Bl 263.

Of these Partic Customs the Cts do not take Partic notice they being presumed not to judicially know them, & so they must be specially pleaded, & if their existence is denied, be tried like any other fact before the jury Ld Ray. 565. 1 Inst 175. 1 Bl 76.

There is an Exception

As this rule when any particular custom has been tried

Stum[t] Land. Part[s] Cust[s] tried and recorded in the same Court in wh a quest arises. for then there is no need of proving it, as it appears on the record of the Ct. Doug 365. 101 76.

There is another Exception to the gen Rule in cases of Gavelkind & Borough Eng. these are well known in this country as customs, but I believe in gen the Lands are held by this tenure — this is the case in Comm.

Of the existence of these two last cust the Law takes notice & of course the Judges are presumed to know them this being the case there is no need of pleading them specially bringing a case within a cust is suffic. 1 Ernst 175. 101 76.

It is a little remarkable that Mr Justice Blackstone ranks the L[t] M. among the part[r] cust[s] — for it has not a single trait of a partic cust. for it extends thro' the whole realm. It is indeed confined to particular subjects but this will not make it a part. cust. for such is the case with the Law of Descent & many other laws. — It is nothing more than a branch of the Comm[n] Law call'd 101 75. that it is not a part[r] cust. see 2 Bl 459 — 461. 467. 2 Ray 175. Ghet 12. 13. Comb 55. 152. 2 Vent 295. 310.

As the L[t] M. is not followed by the incidents of part[r] cust[s], as, it need not be specially pleaded, nor tried by a Jury & the Judges & officers take notice of it. Cal 125.

It is said that when a L[t] M. is doubtful in new cases & of Law may be proved by Witnesses, (Merits) I have no doubt but a local or part[r] usage may be so proved, but when the L[t] M. is gen it can not be so proved — I suppose this rule has been misunderstood — this evidence

Illust. Law, Part. Cust. ; evidence of the Merchant does not go to the Jury but to the Ct. It may be often useful for the Judges there to apply to Merchts, but when they do, they use them as they wd a Dictionary, & then determine the quest. themselves. & I dont believe it ever coud be said that it has sometimes been allowed — that a Merchant shd be called to testify to a Jury in order to shew them what the Laws Christ. 1 Bl. R. 109. 2 Burr 1216, 12 18, 1242. 1 Wil R 295. Doug 655. 4 T R 205. Doug 72. 73.

As to the legality of a cust. it wd be useless for me to do more than refer you to a page or two in Bl — There are seven requisites necessary to render a cust. legal see them in 1 Bl 76 to 78. 1 Inst 113. 114. 1 Rol 565. 9 Co 58

Customs in derogation of C.L. are to be construed strictly — they can never be extended by constructions, A case must be not literally within the Cust. or it shall not at all; thus by the cust. of Gavelkind an Infant can convey his est. by feofft. but the C.L will not allow him to dispose of it otherwise, he cant even make a lease of it — it being in derogation of the C.L. altho' it is much less restrained by the cust. 1 Rol 565.

IIIIII Particular Laws, comprise the third branch of the C.L. there are adopted by cust. & used only in particular jurisdictions & Cts.

They differ from part. cust. in this, that they are not confined to particular local limits, but to part. Cts. Particular Custs you will recollect have no influence out of the limits to which they are confined, not so with part. Laws for, no matter where the cause of act. arose, if it is cognizable

Mun[l] Land. Part[r] Laws } cognizable within these Cts
It is governed by these Laws. The civil Law. & the common
Law are of this kind - they are adopted in the Ct[s] most[t]
pilotage
& Admiralty Cts. & these together with the C.L. com-
prise the whole of the Lex non-scripta 1 Bl 69. 79 to 83.

These Part[r] Laws (the Civil & Common) are
binding in Eng merely by adoption, for they have no, in-
ternal or intrinsic auc. except from immemorial
usage & adoption. — If indeed the Legis[t] had adopt
a code of laws existent in another country, & had them
become part of the written Law of that country, but when
but they were adopted
it is adopted merely by the Cts of Justice it is but unw-
ritten law. 1 Bl 79. 80.

The C.L. & St.L. of Eng. so far as
they are binding in this country derive their auc. from
a similar sanction, to that which gives auc. to the Civil & Com[n]
Law in Eng. to wit the sanction of the Legislatures or the
adoption by the Cts of Justice. The laws of Eng have no
auc. in this country except from immemorial usage
& from usage since the commencement of our government.

But there are some parts &
indeed whole branches of the C.L. of Eng, wh cant be
applied in this country, as those wh arise out of their
monarchical form of Government. These of course are not
binding with us. Neither are such precedents binding
as being manifestly unjust, & such as the Eng Judges
on their account have had cause to regret the power
of Precedent. Here our Judges have a right to alter &
reject, And as to all those branches of the C.L. wh have
not been adopted, they never need be —

Muni. Law. Part. Laws

When the Law of this country, has been adopted by the Legislature and now since it has been adopted or acquiesced in by the Legislature it has so long been considered by the people as their Law & the preservation of their rights, our Judges cant reject it — 1 Fach N 411 to 429.

The C.L. of Eng is in some of the States & in all I believe sanctioned.

What part of the C.L. of Eng. is applicable & binding in this country I will notice under the Written Law. ——

Soon after the adopt. of our Constitution, it appeared that in Conn. we had exploded some of the principles of the C & L of Eng & maintained a new system of our own. It then was solemnly discussed whether we cd have any rule of Law wh C & L of Eng. did not sanction, the objects to this Law was always technical, & the question is now quieted, & indeed I see no reason why it shd have ever been discussed but it was then decided, that each state was competent to build up a C L of their own & differ from the Eng C.L.

There are two or three grounds on which it is demonstrable that we have a right to make a C L of our own. Where the Eng C L is inapplicable to our country we must make all our own for we cannot be made without forming a system of jurisprudence, for the first & simplest case that arises under that it commences a C L of our own.

The Written Law

The second great branch of Municipal Law is the Written Law. (W.L).

(Unw'l Laws U. S.)

By the Written Law is meant the St L. St L. requires no definition, but it may be remarked yt it is the law prescribed by the Legist & comprises the Acts & Lts of y Legist.

It has been a qu in some parts of y Union how far the St L. of Eng is binding in y country. Whether y St of y St L. antient Lts of Eng prima facie are binding here in the same sense & with the same power as the St L. would be binding on Acts made by State. In 1758 Dall 5 Ms 548 note

By the "antient Lts" is meant those Lts which were existant at the time of y colonization of this country & the reason is that our ancestors when they came here brot with them the Laws wh were at y time extant & those were considered as their birth-right. The Engh Jurists consider the Colonies as governd by those Laws extant at the colonization, but they are not subject to the Lts passd after that period.

But tho' mod Lts of Eng are not binding here - still modern decisions are, query as much as the old for these decisions are only additional evidence of what the Law is. A distinction between antient & modern decisions is a mere solecism.

Now I am not contending that these Laws are binding on our Legist, for they have undoubtedly a right to repeal &c. but as the Lts they are prima facie binding on the Cts. 1 Binn Rep 380 to 384. 391 to 393. 1 Dall 108. 108. Sal 411. 666. 2 Dall 75. Pond 52. Kirb 369.

Vide Hoy. The whole of this may be sum'd up thus. So much of y antient St L of Eng. as was extant at the colonization of this country is

Muni Law. W.L. ⅁ is prima facie binding, except where our Legisl. have altered it. But those Sts which have been made since Mr Reeves are not prima facie binding.

Some of the States have adopted the Sts of Eng down to a certain period, by a Legislative act, making certain exceptions. Such is the case in Ky. Conn has not done so. ——

All Statutes are either Public or Private, & sometimes & may be either General or Special.

A Pub. St regards the interests of the whole community.

A Priv. St regards a few individuals in their personal concerns viz property an exception to the Gen. Law 1 W. Bl. 85-6 And therefore the Judge are not bound to take notice of em. unless they be formally shewn & pleaded. But of the Pub. Sts the Js ex officio take notice 1 Bl 85-6.

The application of this distinction is not very obvious at all times, for particular Sts do sometimes litterally & in terms regard the whole community or the concerns of the whole community which is the character of most of the Sts published as those of 39 El. & many &c. & Sts which provides that no person shd do such an act under such a penalty, or if he does such an act he shall be thus punished, is a Pub. St. and There is no difficulty of understanding this.

But there are Acts or Sts relating immediately & in terms to a particular class of men, which are Priv. Sts, the diffs notwithstanding.

Municipal Laws. Divisions

The Rule is, that if a class of persons to which a statute relates amounts to a genus the statute is public; but if it amounts only to a species the statute is private. — But this even must occasion difficulty, for a class which to a higher class is but a species, to a lower may be a genus. Thus. A statute to all the Mechanics is a pub. st. for the class amounts to a genus, it includes all trades. But if a statute only to the Coopers, or to the Blacksmiths, it will be priv. for the class is a species & cant be divided or subdivided into individuals. This Rule is generally agreed to. — 4 Ba 640

A statute relating to all persons qualified to serve a warrant, is public. for the class is a genus, but relating to all Sheriffs. it is private, — the class is a species. Here the first kind relates to all sheriffs, constables, Bailiffs &c. but the latter relates merely to sheriffs, which class can be resolved only into individuals.

Tho it is made relating to pub. — there is no difficulty in the appln of the rule of distinction, but when it is made relating to a class of men the difficulty arises. 1 Bl 88. 4 Co 16, 2 Saun 154. 2 Keny 120. 381. 1 Lev 86. 4 Ba 640.

Exceptions. Every statute however which regards the King is by the Ct. pub. for every subject has an interest in the king, his affairs concerns one the commons of the public at large. Upon the same ground I suppose any statute regarding the Executive of the U. S. or of any State in the Union is public, for whatregards his interest must affect the interest of the Union. 4 Co 77a. 8 Co 29a. 12 Co 26. Doct Pla 338. Plowd 231. 4 Ba 641. Lid 209 Plowd 204.

Mun. Law. U.L. 3 Hence also a St giving a penalty or forfeiture to the king or State is a pub. St. altho' the St operates on a certain class of men only, as on the tanners or Blacksmiths. How far it is influenced in particular or on a particular class but the penalty goes to the Public 4 Ba 840. Shin 429.

On a similar prin. a St relating to public revenue is a pub. St. altho the revenue is to be raised by a tax on a particular class of people 10 L. 57. Hob 65. 12 Mod 249. 613. 4 Ba 840. Hob 227. Lid 24.

It is not an unusual thing however for the Legislature to declare a St public, wh in its own nature or prin. of Const. wd be called private — as Legisl has a right to make the law, they undoubtedly have a right to make this distinction for both are on same principle. As per the rule of public convenience this is often done. In Comm. whereon are incorporate Banks. Insurance Comp. &c the St is in itself declared public A great convenience arises from it. for it removes the necessity of declaring or counting upon it in form.

A St may be part pub. & part priv. as when one sec. of it relates to priv. per. & another to the public.

2d. Sts are also either declaratory of the CL or remedial of some defect therein. these are usually called Declaratory & Remedial Statutes.

A Declaratory St merely declares what the CL is, it makes no new Law & there may be 2 explanatory & declaratory of

Mun[c] Land. W[m] 2 3 of former Sts. than 32 Hen 6, is merely declaratory of the St 32 Hen 6 relating to devises. We have many such Stats in our Books Bac D 141. 4 Bac 550. 10 Co 56. Sal 354. Carth 396.

Remedial Sts on the other hand introduce new Law by abridging superfluities & supplying deficiences of the C.L. such are the Sts of Fr. Mary &c.

Declar Sts are but few, & the most of those wh are not Penal are Remedial 10 Co 56.

Another co-ordinate division of the Sts are of such as are Penal on the one hand, & Beneficial on the other

A Statute inflicts a penalty or punishment if any kind is Penal. & Statute inflicts no penalty or punishment is Beneficial: there is often called a remedial St but by Dr Lofft they are called Beneficial, & I think they shd be so called - for you will observe that "remedial" is opposed to "declaratory" therefore "beneficial" shd oppose to "penal" Bac Ab 414-5. 4 Bac 550. 3 Co 7b. 1 Wils 126. 7 Mod 259.

I shd observe in passing that the word "Penalty" in its extended sense is synonymous with "punishment" Bac Ab 415. But it is now more appropriately applied to denote a fine or pecuniary mulct of any kind, & in strictness perhaps all Sts wh give higher penalties than the rules of natural Justice require wd seem to partake of the nature of penal Sts: thus of a St wh orders the party injured to recover double damages, but it is not so considered in the Books Sal 212. 1 Wils 145. Bac Ab 414. Com Dig tit Stat A 1.

Mun[l] Law. W. L. E.

As giving costs to the party prevailing in an act are always holden to be penal, the reason is that Costs were unknown to y[e] C.L. & are now considered as penal being a substitute for the amerciaments of y[e] old Law, tho' form of the amerciament is now kept up. but it is merely a nominal. Where y[e] party prevailed. Pltff was amerced, but now he pays costs.

The first St. wch ever prescribed costs was the St. of Glou. 6 Ed 1 Ca 11. Sal 205. Garth 119. 12 Ed 4. Hard.

An act brot by an individual in his own right to recover costs on a penal St. is a civil act[n] altho' the St. on wh it is brot is penal, thus. an Eng[h] St. of Eliz gives a penalty of £40 to any person who will prosecute an Att[n] for perjury. The St. is undoubtedly penal, but the act[n] being in Pltff own right (between A & B.) is civil for the act[n] is in form usually an act[n] of Debt, tho' it may be brot on the St. If the pros[n] is by indict[t] or inform[n] it is then penal

So also qui. tam. act[ns] on the Sts of Usury are civil actions between A & B. tho' the St. is penal

The Criterion to determine whether an act[n] is civil or criminal is the form of the act[n]. If it be by process for the K. it is crim[l], but if as by Indict[t] or Information, but if by Writ & Decl[n] it is civil of course — This distinction is a very material one in practice Cowp 382. 391. 1 Wils 125. 4 Bac 573 7 JR 255. A great error was committed in the court last session of sup[r] Ct. from a want of knowledge of this distinction; which were known over the St — qui tam on the St. of Usury

Mun. Land. V. L. 3

4th A division of the Sts into affirmative & negative has been made but is totally without reason & founded altogether on their phraseology. & there are some rules of construction founded on this distinction, but there is practically no more use of it than there would be of dividing them into those printed with the Roman capital & those with the common type 4 Ba 541.

With respect to the commencement of the operations of Sts. it is a rule in GB. that all Sts take effect from the first day of that sess of Parliament in wh they are enacted, unless some other time is affixed. This is founded on a fiction of the Ct. that there can be no fractions of a Term. But on an account Sts must often in point of fact become retroactive, tho in point of theory this will not be, for the fiction of the Ct the Term is considered as one day, & a day has no parts. 1 Bro C 111. 2 Ld. 307. 2 Ray 971. 1 Ld 910 — 19 Viner 495.

And on this prin. of no fraction of time it has been held that if two Sts were enacted on the same day one after the other & relating to the same subject, & no time fixed for the commencement of operation of either that if they repugnant each would repeal the other pro tanto as they were repugnant. But the later & I think the better opinion is, that the one which in point of fact was last made shall repeal the other pro tanto 4 Ba 636. 6 Mod 307. 19 Viner 520.

This idea has been exploded in this state & we have no particular time settled, but our Sup Ct

Mun. Land. W.L. I have determined that no St shall have effect until all the people have had time to learn the St — but what this time is or will be they have not settled for us.

Construction of Statutes

The construction of the St is the means of discovering the Will of the Legislr. & of course the Law for its will is the Law.

In the construction of the St & especially remedial St there are three points principally to be considered viz: the old Law, the Mischief & the Remedy — The construction ought to be to prevent the Mischief & advance the Remedy. 1 Bl 87. 3 Co 7b. The two first of these are chiefly to be regarded & they are to be regarded only to discover the last viz the Remedy. This has been illustrated by an Eng. St forbidding Bishops to make leases for a longer term than 21 years, by declaring them void, the case first arose when the Bishop was living & the question was whether it was void or only voidable & it was determined to be only voidable. for, by the old Law Bishops had a right to make long leases. The Mischief was that the succeeding Bishops were impoverished by the long lease of their predecessor, & as it was decided the Lease need not be void until the death of the Bishop both & not even then unless the successor agreed it. Thereby then the Mischief was without a remedies.

With respect to the construction of Words & Phrases, the same rules are to be regarded as before laid down (in) for of course

Grant Land. W.L. Cons. Lts & construction of Grant Land. for they apply as well to the Written as to Unwritten Law.

"It is a very important rule that Penal Sts are to be construed strictly or according to the letter, so that they can neither be extended or restrained by construction to bring a party within the penalty" 1 C & P. 8 Bl. 8. Blow 17. Leach 107. But may not be in derogation of Penal Statutes

Penal Law has been construed so strictly in Eng as to make it ludicrous & even ridiculous; thus where a St declared the stealing of Horses to be death without benefit of clergy - the St decided, that the stealing a number of horses on the same day but taking only one at a time, was not within the St. & when it prohibited the killing of a Dog. it held the killing a female Dog or Bitch, was not within the St.

But this Rule requires explanation, for as stated alone, the truth is not clear. The Rule is this, that Penal Sts are construed strictly against the subject; & liberally & equitably for him, i.e. a person shall not be adj within the penalty if the St is not within its letter tho' clearly within its spirit & reason, But on the other hand, a person tho within the letter, may be taken out of the letter, if he is not within the spirit of the St. And such a code as did not admit of this construction wd be intolerable

The Rule then is if the spirit may be adopted to take the person out of the letter, but not to bring him

Mem^d Laud. Const^n Hist. Sir Rose rule as set out the Letter. It then appears, that no one can be adj^d subject to the penalty unless he be within both the spirit & letter of the Act. Laud C.C. 387. I never saw this rule laid down except in the Fabricate Hand. Not. penal Acts. as it is there it is a very decisive point cases themselves, 1 Hawk 55. 61. 116. 131. 138. 139. 4 Bac 193. 1 Hawk 17. 465. 4 Bac 649. 651. Laud C.C. 293. 310. There are however several modern cases where this rule has not been so strictly observed see Laud C.C. 1. 41. 295.

Hence in general any universality of expression in a penal Act does not include persons, who, though they come within the letter of it by reason of legal incapacity are exempted from similar penal laws: thus a Penalty to be inflicted on all who do such acts shall be thus punished, does not include Idiots & Lunatics, & tho' the punishments enjoined by an Act does not include Infants, unless it includes them it is necessary to use a phrase for the purpose as "all persons & Infants" &c. 1 Hawk 501. 1 Hawk c 64 s 95.

But notwithstanding the rule that penal Acts shall be construed strictly as to subject, it must be confessed that this is an evasion of the intention of the Legislature which intention as is laid down by Ld Kenyon is the Law in all cases, & is not to be disregarded. & in these cases it is manifest the intention of the Legislature is not to be evaded merely because it is penal. The subject is the rule is so vague that it is difficult to tell what it is

Mans Law. Const. 1 St. } Plow 56. 3 Co 7. 6.
4 Ba 651.

On the same princ. of construction, If the Repetition of an offence, subjects the offender to an accumulative punishmt. he is not subjected to the increased punishmt under Gud of Law even conviction agt him on the former offence, & unless he had been convicted of the first before the second was committed, this is held to be in favorem, & that he shd have the salutary discipline of the first before he shd be subjected to the accumulated penalty of the second. — this is carrying the benignity of the Law a great way; & the case furnishes one of the strongest facts in the Eng. Law of its great benignity.

We have many Cts of this kind in this State they are those which relate to Felonies of Burg. Arson &c. as case where the man stole four horses but a diffrt times, & before the Judgt on the first &c. — held according to the Rule above. 1 Hales. P.C. 324. 427. 570. 685. Dyer 323. 1 Hawk 166. 1 Root 52. 199. 2 Bulst 349.

but this rule of strict construction has not in all cases been observed; thus under a Stat 25 E. declares that the Servant who kills his master shall be considered as guilty of petit treason, & it has been holden, that if he kills his Mistress he is within the St. Plow 56. 4 Ba 651. 3 Inst 71.

Mun[l] Law. Cons[n] of Lt. 3

and it has been determined by our Sup[r] Ct that when the same penalty is repeatedly incurred by the continuance of the offence, but one penalty can be sued for and recovered at a time; as by the St he who erects a nuisance forfeits so much per month as long as it continues. but the Cts have decided that a prosecutor who sues cannot recover but one penalty at once. 1 Root 96. 2 Swift's S. 89.
But this is opposed directly to the Eng[h] Rule as laid down by L[d] Keny on in an opinion on a Ct. Martial, see Beaks Cases 67.

If is a Maxim of Law that Penal Code of any country is strictly local — This is founded on the very elementary Rules of Mun[l] Law that one Sovereign State cannot punish a man for a breach of the Laws of another — the party injured must prosecute & in this case the State in wh the crime is committed is the party injured & so must prosc.
The Laws of one State cant be taken notice of in another so as to affect the rights of its citizens, thus a Murder committed in Eng cant be noticed in any county. Nor can a Murder committed in a neighbouring state be noticed in this. Hayl 7 9 56, 1 Mass 128. 3 Dall 133. Rhed 38. Vattel 61, 619, 232.

The Penal Laws of every country however extend to all aliens while within that country. No person can claim to be exempt from the Laws of any country while he

Mary Land Court tho he is in it, but he owes it a temporary allegiance — He is not subjected for crimes committed elsewhere.

In Mass & Conn there have been some very extraordinary decisions on this point, they have decided that if a thief steals goods in one State & transports them into another he is punishable in the latter, 1 Mass 116. But it has been decided contra in N.Y. 2 Johns 477. 479. And also in the Cir Ct of U.S. Pettibone J. case U.S. vs Page, this was a case where the goods were stolen in a Spanish county & not over sea. & was then last decisions considered to be undoubtedly correct. — The ground on which the contra decisions were made, was the English rule, that when a felony is committed in one county, the felon may be tried in another, but it is to be observed, that, the felon is then tried under the same jurisdiction & municipal Law, & that a grand jury in one county is a bar to a trial in another; this not so in this country — suppose the punishment for horse-stealing to be a fine in Mass & death in Con. then if he steals in Mass & comes into Con. he must on trial be hanged

There is a difficulty here in limine to wit. that it is impossible for the Cts in Con. to know that the act committed in Mass. was there a crime, and if what he did in Mass. was there lawful, it cant become a crime by the continuances of the Corpus (subjoining the storeroom). still by the Laws of Con. he must be punished We have known communities to exist, in which what we call petit larceny was not a crime, such was the case

Municipal Laws. Quest of St. case in Sparta, Inhabitants municipalities may vote again. but by the law of this State had the Negroes stole the property been brought here he could have been hanged

But the greatest objection is that on this rule the judgment in one case can be a bar to a suit but in another State where the thief had fled, but he might be punished 17 times for the same crime & be but sued with the things stolen from all the States.

Beneficial Acts are to be construed liberally & equitably - either by the spirit or letter. The amount of the rule is this, that the letter of the St. may be extended or restrained to reach the intentions of the Legislature - & such is a singular beneficial St. wch will not bear this construction; The rule may be illustrated by examples indefinitely numerous; as the first section extending the letter; The St 7 Ed 3. gives a remedy agt Executors but does not mention Admrs; but it has been holden that they are embraced as they are within the spirit of the St. On the other hand is one restraining the letter. St 32 Hen 8 enacts that all persons having an est in fee simple &c. may devise them, but it has been decided that femes covert can not devise, for before the St, they were not included in the phrase "all persons" 8 Mod 431. 3 Keb 7. 1 Ld Raym 123. 11 Co 71. Plow 365 & 465 Pow D 354. 1 Ves 300.

Under this prin. of liberal construction acts or transactions will under the St. be avoided, are construed by the Ct of Justice to be only voidable

(See the distinction between void. & voidable

Mund. Law Const. St. } under St. Parent & Child.

The Rule is, That if the injury to be guarded ag't wd. be let in by construing it as only voidable, the construction will be by the letter; But if construing it as voidable will not let in the injury, it will be construed as voidable only. Ex. St forbidding Bishops to make longer leases than for 21 years, by declaring them void, the Cts decide the lease to be but voidable — for the injury is not let in, — but imposing penalties. 1 Bl 87.

But on the other hand, when the transactions declared void is of such a nature, as if not construed void, will let in the injury intended to be guarded ag't, shall be void. Thus by St Fraud Conv.s are declared void, if they were construed to be only voidable, they cd be voided by none & cd the parties, who are the very persons ag't whom the St was intended to operate. 1 Bl 87 & Co 59. 60. 10 Co 59a Cro E 141. 207. 2 Bl R 606. Yelv 210. 2 Bl R 1113.

When a St enables a Ct to do a matter of justice to a party the general rule is, that the Ct is bound to do it, whenever a case falls within it, i.e. the words which are permissive are construed as imperative, the word "may" is construed as if it were "shall"; Thus St 4 & 5 W. & M. enacts that the Ct of K.B. may in certain cases award damages & costs, Ct has holden that they had no discretionary power but were obliged to do it. 1 Atk 263. 374-5. 1 Str 131. 5 Bl R 538. 4 Burr 644.

A St taking away a Ct remedy however is to be construed strictly, but this does not seem to be an unrea-

Mun. Law. Const. Sts } universal rule in practice
for the Ld of Lim. tho' in some respects it take away a
Ex remedy - has been construed liberally 4 Ba 650, 10
Mod 282. 1 Sal 421. 4 Br 365. Bun. Ejct 568.

Of Ld explana-
tory of a former Ld it is always to be construed strictly
& never extended by construction, for to extend by con-
struction an explanatory Ld. and be to extend a construc-
tion by a construction, & in this way there would
be end of construction upon construction. Bath
396. Sal 534. 4 Ba 650.

When a Ld is partly penal &
partly remedial, it is to be construed strictly as to the
penal part & liberally as to the remedial; this is illu-
strated by the Ld of Stamford Corp. for this Ld has a
two fold effect of declaring the Corp. void & punish
the party. Now if a Offender is prosecuted it is on the
penal part, & tho it is to be construed strictly, yet
if the act is on the Corp. the Ld is to be construed
liberally Plow 36, 57. 59. Br Ch 215. 1 Bl 385. 3 Co 82.

Diffr parts
of a Ld are so to be construed as that the whole
may take effect, or as it is said that the whole Act may
stand together, Whenever then there is an apparent
repugnance between the parts, they are to be reconci-
-led if possible, but if absolutely repugnant, the latter
must repeal the former pro tanto.
And if there is a saving cretra to the body of a Statute
it is utterly void, as a Law vesting the land of A. in A
King saving the right of A. 1 Co 47. 1 Bl 89.

Mun. Laws Cords

The Rules for construction
Sts are the same in Ct of Equity as in Ct of Law, but
the mode of reporting the construction is diffr, and
the notion is wholly unjustifiable that there Cts pro-
ceed on diffr grounds 3 Bl 431. 433. 1 Sonbl 22.

It is the nature of all mund Law both W. & M. Law to be repeal-
able — if then the C.L. & the St.L. differ the latter will
repeal the former, this not so much on the common
idea of the St L being of higher authority than the C.L.
as on account of being later in point of time

In the same spirit, if one St is late than and
repugnant to it — the last repeals the other &c
so much of it as are repugnant. 1 Inst 111, 115. 4 Ba 688
641. 1 Bl 89, 11 Co 68.

And it follows that as every St is repeal-
able, that a clause enacting that it shall never be
repealed is void, — for this is in direct derogation of the
power of subsequent Legislatures, it renders the St
perpetual & may forbid subsequent Legs making
new Laws 4 Ba 685. 10 Bl 90, 4 Inst 43.

But the Law never
favours repealing by implication, when it is claimed that a prior & a later St are repugnant, that
repugnance must be clear or it will not have
effect of repealing the prior — for it is presumable if
the Legis intended to have repealed the prior St they
wd have mentioned it. 11 Co 63. 10 Rol A. 88. 10 Mod 115.

It is said in
reveral of our Books that an affirmative St does not repeal
the

Mun. Law. Corp. Lts repeal the C.L. in the C.L on the same subject 1 Inst 111, 115. 4 Ba 541.

Now this arises out of the distinction of the Lts into affirmative & negative — which I hold to be totally unreasonable. Now an affir. Lt does repeal the C.L as well as a negative. If it implies a negative of the C.L. it is enough. It is not necessary to use negative language in a Lt to affect this repeal ex. gr. The words of the C.L. entitle the Deft when he is sued by a writ prout to 15 days notice. Any notice short of this is insufft, but now suppose an act of Parl. made, providing 8 days notice shall be sufft. the Lt is affirmative undoubtedly & not more unquestionably repeal the C.L — It is strange that such a rule as this ever have crept into the head of L Coke — Sprat appears he was the origin of it.

The true rule is (1) There is no enquiry about it. That if a Lt is inconsistent with the C.L it repeals the C.L. Com. Dig. title on Lt. C, Plowd 206. Leach C L 252. 1 Bl 89.

If a Lt gives a remedy where there was none at C.L without abrogating the C.L remedy it does not. If merely abrogate & implies a negative, there will be two concurrent remedies, the one C.L the other by St.

When the Lt abrogates the C.L remedy, then the St will be the only remedy. When both remedies are remaining, the one by the Lt is called the accumulative remedy 2 Burr 803. 805. Com Dig. title Lt. B,

2 so the Lt implies a higher or a lower punishment than is implied

Human Laws. Const. St. 9 implicitly by an elder St. the elder is repeald.

So when a later St. varies the former St. implicitly by a former, the presumption is that the Legislature did not intend the former to remain in force 4 Burr 2026, 4 Ba & 54. Leach C.C. 252.

And when a St. implicits a lower punishment is implicit in the St. the punishment is repeald

But if the St. implicits a higher punishment than is prescribed by the C.L., the St. punishment is accumulative, & the offender may be punished by C.L. or under the St. 4 Burr 2026. 2 Show 30 10 Mod 337. 4 Bl. 138

An affirmative St. it is said does not repeal the an affir. St. this rule stated to be altogether unmeaning — They may not however be repugnant, in this case they of course do not repeal but if the latter St. is repugnant to a former, the former must be repeald 2 Show 30. 1 Bl. 89.

The later St being inconsistent or at war with the former is the true & only criterion

When a

repealing St. is itself repeald the original St. is revived, for the repealing act was an abrogation of all evinces the intentions of the Legislature the former 4 Ba & 38. 1 Bl. 90.

When a St. is repeald by two or more other St. (say three) wh are inconsistent with it, this two of these acts calling the themselves repeald still the former is not revived, for it is necessary all should be repeald to revive the first, & as long as

Mun. Law. Const. 46 ; as are of the repealing Act remain, the former is by it repeald 4 Inst 43. 4 Ba. 638.

If a Statute has been once repeald is afterwards revived the repealing Act becomes void, that if the Act was merely a repealing Act it becomes void in toto. if not it becomes void pro tanto only. 2 Inst 686. 4 Ba 638.

Acts done under a Act while it remains in force are justifiable & alligatory if the Act is afterwards repealed — But it is said down in some of our Books that if the Legislature declares the Statute void, the acts done under it are absolutely void — — If the Legislature may declare their acts void, I grant, but I wd be monstrous for the Legislature to declare those acts void, which had been made lawful by its own voice. The act of one Legislature declaring the act of another Legislature void, contravenes other effects than to repeal that Act Genk 233. 4 Ba 638.

This a good Rule arising indeed, out of the very definition of Municipal Law, that a Statute can have no retro-active operation — The definition requires it to be prescribed. 1 Bl 46. 2 Mod 318. Hence if a Statute after being violated, & before judgt is rendered against the offender, be repeald & a new one made on the same subject; the offender is not punishable under either, unless the repealing Act provides the former shall remain in force as to acts committed under it. Reason is he can be punishd under the former for a kind of intent & he has committed no crime at the second — Act after this time

Mar. Law. Const. &c. It must have a retrospective operation, that in three cases of this kind have arisen in this country, in consequence of which it has become usual with us now, to add a clause vitiating the act in effect as to the offences committed under it. 1 Bl. R. 454. 1 Hard 169. 4 Ba 636. 1 Bro 159.

But if a covenant or other cont be made to do an act lawful at the time of making the cont, but wh is rendered unlawful to do by a subs. st. the cont is annulled, as if A contracts with B to import certain commodities into the U.S. within a certain time & the importation of these commodities is prohibited by law before the time of fulfillment, the contract is become void; Or suppose after such cont made a War shd be declared, - the cont is repeald & the party not bound by it, for this amounts to the same thing as an inevitable accident. Sal 198. 1 Bro C 444 & 446. 1 Fonbl 211, & 3 R 267. L. Ray 317. 321, 1352. 2 Ld R 214.

And on the other hand if one covenants not to do an act which afterwards by law it becomes his duty to do, y covenant is annulled, As if one covenants that an Apprentice shall not leave his Master till a given time, & before it be elapsed it by law becomes the duty of y Apprentice to enlist into the Military to repel an invasion of the Kingdom, - the covenant is annulled, for if it were not so a party might loose his noble fortune Sal 198.

But if are covenant not to do an act unlawful at the time, but which becomes.

illegal Law. Cont. &c becomes lawful by a Act afterwards made, the covenant is not annulled. & so a Cap. covenant with his owners that he will not do arms at that time was unlawful, if so it is made afterwards making that act lawful, the cont is not annulled for it does not act as the St. & there is no inconsistency in obeying both the covent & St.

If a contract declared illegal was made while the Law was in force, the subs. repeal of the St does not make the cont good. We had many cases of this kind under the Late stamp act of U.S. — Notes were made during the existence of the Law & on stamp'd paper, — the acceptances thereon were but after the repeal of that Act — the Cts held the Notes to be void, for they were so at the time they were made, & we are to look back at the state of circumstances at the time of making 1 Bl Rep 65.

If the complete performance of an agreement is made illegal by a subs St, still if the agreement can be in part performed under that St so much of it may be enforced by Chan. & must also at Law when the Cts can adapt their remedy to the case. Case, where a Dean & Ch. after agreed to make a Lease for 99 years, & it was afterwards made, rendered them void if for more than 40 years, it was held they did make the Lease for the 40 years — for so much was legal Plow 244. 2 Bl Rep 1163, 1171. 1 Powell 209. 211, 244. 2 Ld Ray 1254, 1 Bro C. C. 448, 450. 2 id 31.

Mr L. Court &c. The Constitution of U.S. prohibits Congress & any of the State legislatures to pass ex post facto laws or any Law impairing the oblig of Contracts Art 1. Sec 10. Now it might be possibly made a question whether this article of the Constitution would effect the rule of Law laid down above "That a covenant not to do an act which afterwards by Law it becomes his duty to do, shall be annulled". Judge Gould thinks it would not; for it relates to Laws affecting directly the contracts between individuals. But where the Act interferes consequentially with the contracts of individuals, they must be annulled, or Individuals might deprive Legisl of the power of making Laws. —

It is said in some of the books that a Dr requiring what is impossible, is not binding. I know not that such a Dr ever was made by any Legisl. It is a Maxim of Law that no man is obliged to do what is impossible 1 Bl 91

It is said by L. Ch. J. Hobart & in one place by Mr Justice Wachestine "that a Law contrary to reason & the Divine Law, is void." But Mr J. Bl. afterwards questions the Rule himself. Ots of Justice therefore are not to enquire whether the Dr is reasonable or not, but must carry it into effect if this can be done; for the contrary idea would make the Ots the arbs. Powers. Ots to a Dr being contr to the Divine Law, you will recollect the Judges are to enforce the Laws of the State, not the

Court & Court to the Laws of God. And there is no just Maxims or rule of Jurisprudence which will allow the Judge to reject the Law, for if the intention of the Legis. is apparent, they must enforce it or follow the example of Judges made under the Protectorate — resign their seats. If they do construe it so as not to offend the Divine Law so they who do it, if not as above — Under upon the principle of rejecting the Law because it was offensive to the Divine Law, many of our most beneficial Laws will be rejected — since there are so many diff. opinions as to what the Divine Law is, a Quaker for instance, will never swear a Witness — the rule surely must be observed 4 Co 118. Hob 87. 89. 1 B C 41. 91. 1 Bonbl 23.

It was at one time made a question whether a Law in opposition to the Constitution could be declared void, by the Cts, but it now settled that it can, I see no reason why it was ever made a quest. the Cts certainly are able to compare the Ls with the sub. fundamental Law of the Land, & if they find the Ls opposed to this sub. Law, it is their duty to void it, for the Court they are bound to support it. 1 Dall 62, 2 Wheat, 2 Federalist 293 & onward — the jury may decide upon it under the direction of the Ct.

If a Law makes a new Law concerning an old offence & appoints particular Judges to execute it, the Judges of the previous jurisdiction are not excluded, this supposes a Ls

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Mar L. Court Sts 3 a new St would provide that Murder (which is an old offence) should be tried by the Select-men, these undoubtedly would then by the offence but the Judges of the previous gen[l] Jurisdictions are not excluded from also having for the antient Jurisdiction of Cts is not to be excluded by implication 1 Haw P.C. 9. 114. 9 Co 118 Cal 452. 2 Burr 1042.

But, if a St creates a new offence & establishes a new jurisdiction for the trial of it, it seems that the Cts of previous gen[l] Jurisd[n] are excluded, for is a case over wh the prior Cts of gen[l] Jurisd[n] never had cognizance; & therefore are ousted of no right 1 Haw C. 9. 2 Hale P.C. 5. 1 Sid 196. Bro J 648. Cro 5 24. 2 Haw 302 n.

If a St confers a special authority on individuals affecting the rights of others, it must be strictly pursued, & it must appear on the face of the proceedings that the Law has been strictly pursued, this Law applies to commissioners of roads Bridges sewers &c, & if they do not strictly pursue the Law, they will be guilty of Trespass &c Cro 26.

If a St enables a certain set of men to do certain acts by the Majority, & also constitutes a certain number of that body a quorum, it seems a majority of the quorum cannot bind the whole, unless that majority be also a majority of the whole body. So it was determined in the case of the British Museum (now) I am not now speaking of Corporations

Mun. L. Court Ltr 3 Mod 13. 4 Ba 542. 11 Co 30. Hob 211, 3 BR 594. 4 id 810, 822

An auc. of a private nature given to two or more individuals is joint not several, unless it is otherwise expressed, & of course the auc. does not survive on the death of one, thus if the Legislature give authority to A & B to sell the property of an Infant, A cd not act alone, or if he shd die the auc. wd not survive to the survivor B,

But when the auc is of a pub. nature it does survive for it is in the nature of an office Stra 117. 4 Ba 403. 442. 1 Inst 181, 1 Roll 67

If a power of a pub. nature is given to several, the act of a majority in the execution of that power - all being present is the act of all - or is binding on all (1 Inst 181 b. 1 Ba & P 229. 2 Burr 1017. 1 Co 30. 3 BR 592.) Thus if 5 persons were made commissrs of a road or Bridge, the act of 3. all being present wd be binding

These rules do not apply to Corporations, for all the Corporators being summoned, an act of the majority of those present, no matter how small the number is will be binding, provided there is nothing in the act of Incorporation to the contrary, 2 Atk 212. 1 Dos & Pul 236. 237.

Pleading Pls & the Mode of Prosecuting upon them.

Merely pleadg a Pl consist in stating the facts wch bring the case within it — for the purpose of pleadg a Pl it is unnecessy to refer to it, Thus in Pleadg of Pl Limn, the form is merely that Defft "non assumpsit infra sex annos". So of the Pl E.I.P. it is not necessy to refer to the Pl but merely to say. "there is no Note or Memorandum in writg of the agreemt" to see forms in 3 L Ray 11. 221.

And here observe that Pleadg a Pl, counting upon a Pl, Reciting a Pl are often in the books used as synonymous — but they are all defft things. Counting upon a Pl consists in an express reference to it as by the words "by virtue of the Pl" (or "agt the form of the Statute in such case made & provided" Reciting a Pl is defft from both these, it consists in repeating or quoting its contents. It is true a Pl is sometimes pleaded by reciting, but still Pleadg & Reciting are two defft things

It is a good Rule that Cts of Justice are bound to take notice of their Pls & Offices, they not being set out in the Pleadgs for they are presumed to know them & it is not necessy to set them out for the information of the Ct

Pleading a Pl does not imply an express reference

Of a Statute to the contrary, the Judges are not bound to take notice unless they are specially pleaded & shown, for they

Mul. L. Cas. &c; are presumed to know all the Rules of Law, & therefore ~~are~~ need not be specially pleaded they are not Cor. 1 Bl 86. 4 Co 76. 10 Co 57. 1 Ba 36. Bro. E 236. 2 Mod 57.

It is necessary at Cl to set out a private Act in the pleadings in order to take advantage of it.

On Cor. by our Local laws a Private Act as well as Pub. one may be ~~not~~ given in evidence under the gen. issue Indeed in this state any thing but an act of the Leg. may be thus given in evidence Ch Con 342

Even here however if one defends under a Private Act he must reserve it to the jury, but he need not plead it. for this is matter of Law, but a Priv. Act is matter of fact. But in Conn as well as in Eng. If an Act is founded on a Private Act it must be set out in the pleadings, for it is nothing more than a Deed. Indeed when one brings an Act. on a Private Act & does not recite it, it is clear he has no right of Act. & he has nothing to which to apply his facts 1 Ba 38. 4 Co 63. 4 Co 76. 10 Co 57. 2 East 341.

A Pub. Act when required to be pleaded need not be recited. There are cases in which a Pub. Act must be pleaded but there are none in which it must be recited, for the Judge take notice of it ex officio. There is not a case in which it is necessary to recite a Pub. Act, & to recite one is altogether unnecessary, unlawyerlike & bungling — Ld Mansfield says that if a man recites a Pub. Act he will be apt to think it half a letter.

It is never necessary to recite a Public

Insuff. L. Pleas & Pr. 3 St. 170 There are many cases where it is necessary to plead them

There are many cases where it is necessary to count upon them, but it is not of course necessary to count upon a fact because it is to plead it.

I observed that it is not necessary to recite a fact, still a misrecital of a fact is not always fatal, the Defendant is in some cases even after verdict. In some of the books it is said that the misrecital of a fact in an immaterial point is cured by verdict - But you will find many contrary rules laid down on this point Cro C 376. 136. 522. 403. 559.

Now I take it to be absolutely impossible to reconcile all the authorities on this point, but it is the opinion of Ld Holt, (whose opinion is to be highly respected on such a point) that the misrecital of a fact is not fatal unless the Pleader ties himself down to the [illegible] recital, as by the words "as of the form (or by virtue) of the Act aforesaid". If the conclusion is "as of the form of the Act" generally, without stating "or aforesaid" it is not fatal, but the Judges will take notice of the true Act. Ld Ray 362. Blow 79. 84. Cro C 233. Freem 211. 2 Mod Rep 516. Doug 90 to 92. This appears to be the true rule upon the whole & holds whether the misrecital is on a point material or immaterial; But after all it is not settled, notwithstanding the many distinctions found in the Books.

The misrecital of a private Act is not fatal on Demr or after verdict

Mund Law. Obat 2 Lt &c ; unless it is recited upon oyer and then demurred to. The reason is that the judges do not know any thing of this private Lt, neither can the misrecital of the premisses of the Lt be known to them without oyer, & a Dem. raises a quest of Law upon the fact appearing on the record. The true Apother way would be either to plead nul tiel record, in wh case the Lt produced wd not support the Deft's. Or shew the variance by a special plea. Or recite the Lt on oyer & then demur to it. 4 Ba 655. 2 Mod 317 2 Ray 1582. 2 Mod 241. 1 Sid 350

And a fact Lt when used by way of defence to defeat a specialty - as a Deed or Bond, must be pleaded specially by C.L. Thus if in an action on a Bond Deft would avoid himself of the Lt of Usury he must so plead the fact as to bring the case within it. So also of a Lt under the Gaming Act. Howard ans. to plead the gen. issue & give the Lt in evidence. L.C. Coke gives an unsatisfactory reason for this, viz: because of the solemnity of making the instrument. The true reason is that giving the Lt in evid. wd be inconsistent with the plea of non est factum, 5 Ba 419. 5 Co 59 b. 119 a & Hob 72. 3 Sal 391.

But in Cases where the Lt may be given in evidence under the gen. issue to defeat a specialty 5 Co 3 42. By a rule of the Sup. Ct of Louisa if the defence to a specialty is such that it might be pleaded specially at C.L. the party must give notice to Deft of his intention to plead it so

Mut Land. Plead Stt

In declaring upon private Lr or pleading them in any manner, it is always necessary to recite them substantially, tho it is not necessy to do it verbatim; & this for the reason before mentioned, that the Judges don't know what the Lrs. 4 Co 76. 2 Roll 466. 2 Mod 57.

When a Lt is partly pub. & partly priv., that part wh is priv. must be recited - so that the adverse holds here 10 Co 57. Hob 227.

But it is never necessy to recite the Title or Preamble of any Lt, for the Title is merely the name, & the Preamble is the reason of the Law & recite the Title or Preamble as any part of Law itself 3 Co 33. 4 Ba 655, 656.

Since it was once holden that the misrecital of a title of a pub. Lt was not fatal on demurrer but has since been decided otherwise. But after all I doubt whether the rule is either of the cases is the correct one - see the cases 2 Ray 1. Hardr 324. 4 Ba 658. 6 Mod 82.

Now the Rules as laid down are, on the one hand that the misrecital of a Title of a pub. Lt is fatal or dem^{r}, and on the other, that the misrecital of the title of a pub Lt. is not fatal on dem^{r}, & there is no distinctions taken cas in the case of L Hold alone. I have doubt whether that distinction ought not to be taken

In Eng. when it is necessy to recite a Lt it must be recited with it

Pub Law. Pl'g &c; Date & the Place where it was made or it will be void. Dav. Jam. Cas 2 Bac 246. Cro Jac 232. 19 Vin 307. Com 474. Com Dig Ac. Lt. F.

To a Dec. on a Spec. Lt, mere Recital may be pleaded, for this is a quest. of fact, but to one on a Pub. Lt such a Plea would be inadmissable, for this is a quest of Law, 8 Co 2 b. 4 Ib 76. Cro E 559. 2 Mod 97.

It is a gen. Rule, that in declaring upon a Pub Lt, it is unnecess. for the Plaint. to count upon it, that is he need do no more than state the facts so as to bring it within the Lt. & this for the reason that the Judges are supposed to know these Pub Lts. 1 Ba 38. Carth 482. Cro E 601.

But to this gen. Rule there are several Exceptions. 1st Exception. If there are two concurrent remedies the one at C. the other by the Lt. It is holden that if Plaintiff should count upon the Lt if he sues under it. Otherwise it is not to be known what remedy he pursued — or rather the presumption will be that he pursued the C.L. 4 Ba 18. Com Dig Ac. Lt. F.

2d Excep. In Ac. on Stat. upon Penal Lts, the complaint must always count upon them. & this even if it be on a Pub Lt — whenever the Ac. is but to recover a penalty inflicted by a St, the St must be counted upon. ——— This reason of the Rule never discovered. — Plowd 206. 1 Ba 38. Keyl 32.

Mose 2. Wms 2 &c } 1 Bent 103. 7 MR 521. 2 Burr 1209
6 it 126. This rule is positive, but I see no rea-
son for inventing upon a dt to never a hund.
by unless there exist something, which never
does exist in fact.

2d Stat. If a spl dt gives a med ac which is one
not known at C.L. the party suing upon
the dt must count upon it. or as stated
in some of the Books, the party suing must
recite it. — Both the libels some years
ago to observe, that this must be incorrect
& that it shd be "count". & I perceive in a
late case before the K.B. Ld Ellenborough no-
tices this error & assigns the reason, that it crept
in from the antient rule wh made it necessy
to recite it, wh rule has long since been laid
aside Salk 365. 1 Wms 564. 4 Bac 651. Wms 6 134. vide
Ellenboroughs observations in 2 East 334. In the above
case you will find the rule sometimes laid down
with the above error. To illustrate the Rule
— At C.L in ac of Waste the loco. qud. could
not be recovered; & dt was then made wh ena-
bled that y loco qud. shd be recovered in this ac-
tion the dt must be specially pleaded — See
no reason for this unless it be to shew that by
the dt he had the right so to recover.

But notwithstanding the
Statute an old remedy to a mod case the Judges
have done viz. that there is no necessity to count as
at C.L.; thus St Ed. 3. gives an ac of tres. to Q. for the

that Land. Wd Lt for the good of a Co to convey away his lifetime, here because this Lp was a Cd remedy - no need form of act is req. any Eyr 226. 4 Sa & L. 2 Ba 439. 1145. Com Dig at Ld. A.

The result this of the Gen Rule with the Exc[ep]t is this. That is an act or a fact not penal there is no one capity of Stat counting upon it would this is a civil remedy. or a mod act is given by it. — Thus if to Stat creates a right or duty & inflicts no penalty but only gives damages for the neglect it is unnecessary to state & count upon the St. — So when a St not penal merely recites an offence & does not assign a remedy, the Cd remedy is to be enforced & it is unnecessy to recite, & count upon the St. Catt 362, Sal 212. ———————————————

I observed that in all cases in wh a prosecution is founded on a penal St, the complaint must count on that St. Ladd.

If one St prohibit & another provides the punishment, the complaint must count upon both for both together constitute the Law, & neither of them alone, for the one constitute the offence the other the punishment. Mood 216. 4 Ba & C 556. & East 333.

An offence may be laid in one indict as being against both the Com & St Laws, but this must be done by two distinct counts. for if laid as both in one Count, it wd be in the nature of a plea

Treason L. & Lt. duplicity, & doubtless wd be quashed, but whenever the prosecutor's doubt the court to bring his acc. he may, nisi prius at bar by the court Lee. Lt C.C. 235.

When part of an offence consisting in connected acts is agt the C.L., & part agt the St. — It is proper & indeed necessary to count upon the St, but the words "contra formam statuti" are to be confined to that part of the offence which is agt St. Thus entering by force into a mans land is an offence at C.L. but hunting there is agt St, now if an act be but for entering & hunting, the words "contra formam St." wd be confined to the offence of hunting Salk 219. Carth 382.

If a temporary Stat St after having expired be revived by a subsequent act St. if the case arising under it be such as to require the St shd be counted upon, it will be sufft to count upon the former only, because the former makes the Law the latter only revives it. — Yet wd doubtless be safe to count upon both Stats 1 Sho 106. 4 Ba & Ad. 656.

If an Indictment for an offence at C.L only, concludes "contra formam statuti" this counting upon a St may be rejected as surplusage — The rule is laid down generally. But I think however this could not be thus rejected upon special Dem, tho it could after verdict or upon Dem, — for any repugnancy is fatal on special Dem. 5 Bac 162, 4 ib 362. 3. Com Dig 20. Com Dig Act Lt C. 2 Hawk ch. 25. sec 119. 116.

Mar. L. Ch. 26 } An Exception in the enacting clause of a St must always be negatived in a Dec. or complaint founded upon it. But exceptions, qualifications or provisos in a substantive clause need not be negatived. — indeed there is no need of it, 1 Burr 133. 1 Bac 141. 5 Co 83. 6 Co 539. 7 Co 27. 8 Co 542. 2 Doug 321. — 1 East 646. Now this distinction or different in-pressions may seem to be arbitrary — but really it is not so — the reason is that when the exception is in the enacting clause it is a part of the description of the offence, & without this exception the offence cannot be properly described. But when the exception is in a substantive clause then not so. E.g. We have a St in Car. respecting the Sabbath, wh enacts that no man shall do any secular work on that day except it be a work of necessity or mercy, how a Dec. on this clause must negative the exceptions viz. It was not a work of necessity or mercy" In a subsequent clause, it is provided that the act shall not be brot after 1 Month has elapsed, how here the Pros. need not allege that one Month has not elapsed for the offence was described in the enacting clause, & this last proviso is matter of Defence for Defft. & Pltff has nothing to do with it.

I observed above that when there were two concurrent remedies the 1st remedy was cumulative, I mention it now to introduce another rule viz. If in such case the Pros. brings his act. under the 1st & fails — in consequence of omitting some requisite, he may resort

to 2d.

Mod. Ca. 182 to 2 Ld. Raym. 1182 Answer upon the same contempt if he can sustain his act. 1 Bl R 900. 1 Haw 211. 2 id 302. 356. 2 Kub 135. Sal 82. 5 Mod 169. 2 M Bac 493 to 495. ~~ob to cum~~ pros. this would be otherwise - for antient acc. of Rule see Cro C 291. 317. 5 C 99.

If that wh was no offence at C L is made an offence by St the particular mode of prosecuting is prescribed by the St. that mode must be pursued & not is said, that mode only. Hence if a St creates a mere offence & provides that it shall be prosecuted by Information, an Indictment will not lie, neither will any other kind of suit. Cro J 644. Sal 45. 7 C 36 a. 2 Burr 803. 805. 804. 4 Burr 2023. This rule however is to be taken with qualifications. It is a good Rule, & can hardly be said to amount to that, for the more cases come under the exceptions, than under the rule — It indeed hold only in two classes of Cases.

1st Where the particular mode of pros. is prescribed in the prohibitory clause (I call'd in 1 Burr 544. "A prohibitory particular clause") in the class of cases mentioned in Rule 1 Ante.

2d Where there is no prohibitory clause, but the St enacts "that whoever does such an act, shall be punished thus and thus." — here the mode prescribed must be pursued 1 Burr 544-545. 2 Burr 803 & 805, 804. 4 Burr 2023. 2 Haw 302 n. The reason why the rule holds in these cases is, that the offence & remedy

the Com. Law. 9 Ves 16 ; remedy creates every inconvenience attended, that they cant be separate. It is therefore presumed the Legist intended this mode only to pursued

But if the particular mode prescribed is in a distinct substantive clause the rule does not apply. in these cases the offender may be prosecuted in any C.L form. Thus suppose a St to enact, that person shall be allowed to erect any private nuisance — which is a C.L crime — It is a substantive clause enacts that he shall be punished by the pub. prosecutor. - now as this is in a substantive clause. the offender may be punished by indict or any other com. Law form. — for this does not exclude the C.L remedy by implication 4 Bac. 215. 2 Hawk 302 n.

And if that which is prohibited by St was punishable at C.L. the St remedy is cumulative only, & neither the C.L or St remedy may be pursued at the election of Prosecutor, tho' St prescribes a particular mode, for in this case there was a remedy independent of & previous to the St. & the St does not oust the C.L remedy by mere implication. 2 Burr 803. 805, 806. 4 Bac 202. 2 Hawk 302.

If a St vests a right or offence & sanctions & prescribes not a remedy, the C.L will of course lend its aid to enforce the right & to punish the offence, & here the punishment is for a Misdemeanour. ex. suppose the St only says " he shall be punished

Chan. L. Civ. St. for doing a particular act. The C.L. provides the remedy. & he who violates the St. is guilty of a misdemeanor at C.L. for violating the laws of the State. 1 Bur 444. 3 Lev 290. Doug 425. 10 Co 75. Cro C 553. 6 Mod 26.

If a civil remedy in such a case is to be sought it is said to be an act on St. But this seems to me to be incorrect language - for the St gives no act - the right is, the right to be enforced is given by the St, - but the mode of doing it is furnished by C.L. - it is an offence created by St to be enforced, as opposed, by C.L. as a misdemeanor for violating the Laws of the State

Obstructing the execution of a power granted by St is an offence at C.L. & the Indict need not & ought not to count upon the St. at all. Thus suppose a St gives certain powers to commiss^rs of a Bridge & a person obstructs them in the exercise of power it is an offence - not as by the St. for the St provides not that the offend shall be punished - it only grants a power to the comm^rs - It is the C.L. which forbids persons obstructing them - Therefore the St ought not to be counted upon. Doug 425.

Who may Proceed on Penal Sts.

It is a gen^l rule & indeed a first prin. of Jurisprudence that when a wrong is done, the remedy appertains to the person or party injured. Therefore (as it is a C.L.

Mul L. The Gen. Q a Q and; That a Pub. Offence as such, is never to be prosecuted by an individual in his own private right or capacity. The Pub. & the Party injured & therefore the remedy belongs to the Pub. & is in a Monarchical government as Engl. the King 4 Bl 2 & 7.

It may be necessy to observe that a Pub Offence may & often does include a private injury.

When it is said that a Pub Offence cant be prosecuted by a private individual, it is not meant, that he cannot prosecute for a private injury suffered all that is meant is that he cant pros. for it as a Pub. Offence. If one assaults & beats another, the Offence is Pub. so far as it regards the Pub, & Punishment as it regards the individual injured, that the individual does not & cannot pros. for the Pub Offence but only for the civil injury done to himself.

But notwithstanding the said Rule we find that individuals do prosecute in Eng. They do, for & in the name of the King, & the Law gives them one part of the penalty. This a pros. but or an information &c. stiled, the Pros. of the King on the Information of A.B. against C.D. & and I find that in Eng pros are conducted in this way even in cases of felonies, but the practice has never been adopted in Con. — this rule you will not find laid down - but see 1 Chandler 1 Root 47. 190. 194 203. & Lecet C C Papers. —

Hun L. 111 Pro. 3 Agn Notwithstanding the general Rule there is a mixed kind of prosecution, partly Qui and partly private, technically called a "Pros. qui tam" This is a species of Pros. always commenced & carried on by an individual. It takes it's name from the Latin form of it. "qui tam pro Domino Rege, quam pro seipso" 4 Bl 308. 1 Ba 37. 3 Bl 162. Com Dig A. 11-21.

One remark should be made before I come to the detail, & it is one which has not generally been attended to - It is that the Individual prosecutes alone in these acts tho' he prosecutes in behalf of the King or State as well as of himself. - This tho' it may seem to be immaterial, is in practice very material - It seems to show the nature of the prosecution. - A & B prosecute alone & altho' the King or State may receive advantage from the Prosecution, still they are no Party to it - the act is civil. -

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There is a great deal of confusion in the books as it regards these qui tam proceedings, & it has arisen from not making the distinction between qui tam actions & qui tam informations. A qui tam action is commenced & carried on by a civil process, a qui tam information by a criminal process. 3 Bl 161-2. 4 Bl 308. Qui tam complaints are commenced with a forthwith process or process by qui tam informations. a "forthwith" writ

Mod L. Qui tam suits proceed as one commenced by a civil arrest. But qui tam suits commenced by a civil bailiff are qui tam acts as contradistinguished from qui tam informations. Now an action but by an individual in his own right on a penal St is civil, & the act is commenced by Writ & Declaration But it does not follow from this, that because the act is founded on a penal St, it is of course civil penal. For if the act is in a civil form the act is civil, if in a criminal as by Indictment it is criminal. Thus if an act be but on the St against Bribery to recover the penalty the act is civil, it is properly an action of Debt Carth 382. 1 Mod 125. 3 Mod 46. 4 Mod 756. 758. 7 Mod 257. This distinction is a very important one & is not merely verbal or nominal, for the distinction between the civil & criminal act are in many respects great As in a civil act Deft is entitled to 15 days notice the same is none, — civil act he pleads & he pleases by Atty but in crimi the appears in Ct himself — In civil the Record is amendable by the St of amendments — not so in crimi acts — Civil act is by the affirmation of a Quaker is admissable — but not in crimi, — Civil acts with a few exceptions & this tions — which are but before a single Judge of the Peace are appealable to a County Ct, not so with crimi — In crimi cases the Jury are Judges of the Law as well as of the fact, not so in civil cases &

Mod L. Qui tam &c The neglect to attend to this distinction has lead to all the confusion.

Qui tam.

Pros. are generally founded on penal Sts. to recover a penalty or forfeiture of some kind, indeed whether they by ac'ns or informations they are now understood & so considered & treated as in nature of penal Sts. for a qui tam property so called was hardly known at 3 Bl, or as a qui tam they were unknown at 4 Bl there being but a very few cases 4 Bl 308. 2 Hawk 377. 1 Bac Ab. Qui T & 377. Com Dig 360. 5 32-3.

A Popular Action, is one given to any person who will sue for a penalty incurred for the violation of some penal St. It is called "popular" because it is given to any person who will sue — to the "people" at large. 3 Bl 160. 2 Bl 437.

In some cases the whole penalty, in some a part only is given to the pros. this last is the most usual — but whether the whole penalty or a part only is given to the pros. it is called a popular act. Com Dig Qui T. G1. 3 Bl 161. 2 Hawk 265.

But a popular act is not necessarily an act qui tam, tho' they are most always confounded — for when the whole of the penalty is given to the pros. he may pros. in his own name only without any mention of the king or State; But it is said in some of the books that in this case the act may be but qui tam

Mod L. Qui tam, Qui tam. but I take this to be incorrect & to have arisen from the error of confounding the popular & qui tam actions; a qui tam action is when the penalty incurred goes part to the Gov & part to the prosecutor

Again a qui tam action is not necessarily a popular action, for in some cases, the penalty is to be recovered only by the individual injured & he brings the action qui tam. Com Dig Action B 1, 5. 3 Bl 161

In what cases can an individual sue upon a penal St in his own right.

1st a gen Rule

That when an individual is injured by an offence against a St, he may have an action on that St by the offender, tho the St does not expressly give him such a remedy — it does impliedly 4 Ba 653. 11 Co 75 b. Com Dig Action A1. Suppose for example a St provides that "he who erects a private nuisance on a public man's land shall be punished thus & thus", but says nothing, with regard to the individual injured by such action; now as the St is enacted for the good of the individual — he shall have an action impliedly.

2d another gen Rule not much unlike the former, That whenever a St prohibits or enacts any thing for the protection of individual rights, the individual injured may have an action upon the St, altho it is penal & expressly gives him no right to recover 2 Rund 377. 4 Ba 653. 6 Mo

Mar. L. Indictment } 6 Mod 26-7. Com Dig. Ac. St. P.

When a St inflicts a penalty for d is prospecting an individual of any right, without appropriating the penalty the indict. injured by the violation of the St. & not the Pub. is entitled to the penalty. Thus, an Eng. St makes it penal to carry away tithes before he has set out the tenth part. It has been decided that on a breach of this St the penalty goes to the person injured. It is said an action on the St at C.L. is the remedy. — this I totally is an absurdity — but I understand it to mean merely this, "that the party has an action supplied by the C.L. to enforce the right given by the St. & in this sense it's a correct proposition 3 Lev 290. 1 Mod 169. Com Dig. Ac. St. P.

The remedies where how indict. may pros. on a St. in any form. We now will consider when an indict. can support a qui tam action or prosecution as a St.

And here it is a Gen. Rule, That if a St gives the penalty or part of the penalty inflicted for an offence immediately to the Pub. only — to any person who will prosecute for offence, the person pros. may have an ac. qui tam for the penalty — Now what reason there is that he sh. have a qui tam ac. when the whole penalty is given to him I could never discover —

The rule is the same when a sum

Pl. L. Quitam & sum certain is given to the Pros^r & a fine to the Pud. for it is nothing more than a diffr mode of dividing the penalty 1 Ba 37. 4 Co 18. Dyer 95. Com D. A. L. E.

How of the enquiry and ... no, how are these rules reconcilable with the general declaration above, "that for a Pud offence the Pud. alone should prosecute", I answer, that the gen Rule is one of Pl. L. & the Pros^r of the individual prosecutes is that the K gives the right & doubtless the Legis^r have power to compromise such a right

But if no particular penalty, or part of a penalty, or other emolument is given by the Lt, to the individual who prosecutes, no individual can pros. for none has an interest. you recollect I am still speaking of cases in which the Pud alone is injured 1 Ba 37. 2 Raw 263. or 277. Jeffrd.

But on the other hand if a Pl creates an offence both as to Pud & individ^s & gives a part or the whole of the penalty, or damages to the Pros^r. — the Pros^r may bring a qui tam act as the Lt. This illustrated by a Lt of Connect. act breaking the peace, which enacts that if any one breaks the peace he shall pay a fine and also damages to the individ^l injured — a qui tam act will lie. 1 Ba 37. 2 Raw 277. 4 Co 18a

24 a L 7 Jeffr allots a penalty to the party injured by the offence that person may sue for it alone, by a act as to

Imun Land & or otherwise without joining with him the State or King in a qui tam act. Com D. Abr. D. 5.

In gen when a fine or penalty & any part is given to the pub. & a civil remedy is given to an individual, the fine may be inflicted on conviction in the civil suit, this the suit be for debt or on the St; & not qui tam. 4 Ba 11. This analogous to the old capiatur pro fine 5 Ba 191. 193. 2 Ba 506. Sal 6 Ph. Cases 399. 290.

When no form of act is prescribed for the recovery of the St penalty the proper form is an act of Debt. I don't say this is the only form but it is the most usual & appropriate one. The theory of the Law is this. "That whenever a St provides the offender shall pay so much to the Pros. he becomes a Debtor to the Pros. to the amount of the penalty, on the commencing of the suit. & he is thus considered as a debtor under the implied engagement under the civil compact. 3 Bl 160. 161. 1 Ph 175. 4 Ba 533.
It has indeed been once decided in Con. that ind. ass. and lie, but this is in direct opposition to the Ct. but I know of no other case in wh. this has been done Exp D. of. Cases 92. 2 Law 252

If a penalty is given by St party & part to the King & part to the Pros. the King may pros. & recover the whole 3 Bl 162. 2 Hawk 392. 11 Co 65, 66 7 Bl 536. — The reason of this rule is that —

Hawk L. } the part is given to the Prov. is given to him merely as an inducement to Prov. - & when a the thing prosecutes, he is entitled to the are then a prosecutor, & to the etc as thing. - A L has been lately made in this State, to enable the State to Pros - but merely it was totally unnecessary. 2 Cons L.A. p 164. 182.

A bona fide conviction in a qui tam Pros or a Pros - is a bar to any other prosecution, even a public one - for the same offence, if there were not so, the offender might be punished twice to the same offence.

And e converso, a conviction on a pub. Pros. is a bar to a qui tam Pros. -

And the same rule in both its branches holds as to a bona fide acquittal 3 Mc 260. Cro J 480. to 482. 11 Co 63-b. 1 Ba & Al. 2 Hard & J. 76. Com D. Abr 11-C2. The rule you perceive requires the conviction or acquittal to be bona fide. This is to guard, [illegible] against sham prosecutions by friends of the offender, & an acquittal sham acquittal. In prosecutions by the King or States there can be no such presumption but the Pros. was not bona fide.

The pendency of a qui tam Pros may be plead in abatement of a subsequent public prosecution for the same offence. In some of the books it is said the pendency of the qui tam may be plead in Bar, but it is

Ma Law Ex. incorrect, it is laid down by 2 Hob. but
L Mansfield in 3 Burr says it must be alled in
alatement 3 Burr 1423. 2 Haw 391. as to the conte
mn Cro E 261. Hob 209. 1 Rol. Rep. 49. 134.

The person
daiming a penalty or sum of money under a
penal St has no right of attaches in him until
the suit is commenced but by commencing the acon
, in the penalty he has an inchoate right in it which
is not consummated unlill final judgt. & before this
his right to the penalty is like the right to property
is a state of nature, — no indivd had more
right to bring the acon than another, but after
the acon is once commenced no subsequent pros ÷
shall interfere at all with the right of the first
— I am now speaking of popular acons 1 Ba 99. 2 Haw
391. 2 Hawk 316. 2 Bl 497 2 Lev 141. 3 Burr 1423. 2 Stra
1169. Inshort - that it is a very essential part
of the rule, that the penalty or part of the pen-
alty is given to any one who sues. & not to
party grieved Hence it follows that
when the St gives a penalty to the pros. the king
may bar the suit or pros. by releasing the
whole penalty or by a pardon before the acon
is brot by the individual; — but after the acon
is brot, the king can release only that part
which belongs to him, for the pros has ac-
quired a right to the penalty by commencing
the acon & this the king cant release 2 Haw
392
275. 2 Bl 497. 11 Co 65 b. Hutt 92.

M' Law

It is said however, the Parliament can release the whole penalty after the act is committed. It is difficult to say what an Eng. Court could do since its present constitution: but I am sure it could not be done in this country. It is contrary to the fundamental principles of Juris prudence — It could not be done consistently, no way except by repealing the act which gives the penalty. 2 Bl 437.

The King or State cannot even release the act but for the suit of the party injured, when the penalty is given to him, for it is but matter of justice. And as it is regarded as it is strictly remedial: & the party injured has a right to the penalty antecedent to bringing the suit. 2 Hawk 392 — Moore 98 Hoy 106. 2 Bac Ab 84.

It seems that at C.L. the Defr might release his part of the penalty after conviction & it would be an effectual bar to any subsequent Pltf. for the same offence, but a release before conviction would not save this bar, for the Pltf's right to the penalty is not consummated until after judgt 2 Hawk 392. 2 Rol Ab 83.

By St 4 Hen 7. c. 20 it is enacted, that no covinous recovery in any other action shall be a bar to any Pltf. for the same offence but either by the Pltf or by an individual — And notwithstanding the act shall

Mar. Law shall be of any avail. Th[is] regulations you will perceive to prevent collusion between the offender & the prov[r] to the detriment of pub. Justice 2 Hawk 392. 7 Mod 162.

It may be made a question however, how far this Ct was necessy. We have no such Ct in Con. Know of none in any of the State. It raises a quest. on the nature & operation of Fraud. Most Quest. Does not prove the Ct gives the whole penalty to the Prov[r]. Ct. Brings an act[n] & recovers judgt, & then releases the penalty (we allow this release to be evidence, to prevent a quest of fact arising) & then B. commences a second act[n] for the same offence. Deft pleads the former recovery, to wch Pltff replies, "per fraud dem[s]" wch is confessing & avoiding the quest. 1 Saund 395. 3 Lev 97. Vin Ab. tit usual. Wh. and. relate to the nature & effect of fraud at C.L.

And further by St 18 Eliz the Prov[r] may not compound at all, till a Ct be answ[d] made in Ct & not then without leave of the Ct, on pain of the pillory & other punish[t] & the Ct's discretion with the Ct to grant or refuse leave to compound.
We have no such thing in Con. And a quest. analogous to the one above might be raised upon the efficacy of this St. 1 Ba Ab 43. 2 Hawk 397. 1 Bac & Pul 46. 5 TR 96. Stra 167. 1 Wils 99. Com Dig Ac. Ld C.

And when leave to compound is granted

Qui tam Release & grant the King part of the penalty is to be paid into Ct — this is always the conviction 4 Nov 1929.

But after verdict it seems leave to compound is never given except on proof of Defts poverty Com Dig Ct C.L. Ltr A 167 Bacons Notes 462.

And even a bona fide release by the Prosr and not at C.L bar the King or Pltf in it of the right if any the Prosr given made without the leave of the Ct 2 Hawk 392. 11 Co 65-b.) for otherwise Deft might be twice punished for the same offence

If the Pltf in a popular act dies, releases, withdraws or suffers a non suit, the 2nd Prosr may proceed on the same complaint, or he may commence another Prosr. at his election 2 Hawk 392. 393. 11 Co 65b. 66a. 5 Co 44b. 3 Bl 162

But when the action is given to the party injured, & he dies, releases, withdraws or suffers a non suit, Pending the act, the 2nd. Prosr cannot proceed in it, for the Pltfs part of the penalty cannot go to the King, & he cannot Prosr. for the representatives of Pltf 2 Hawk 392-3 Moore 58 Roy 100.

If several Persons are convicted in a Popular act for the same offence, only one penalty is inflicted upon the whole Case of two or more joining in committing a breach of a Statute

Brit Law. Ito offend" But when several persons are convicted in a Qui. Tam. whether upon a Ld or on other ground as at CL, the penalty is distinct i.e. the whole penalty is inflicted upon each. The reason of this distinction it is said is, that the Act is for a debt & the pros. is to recover a satisfaction the Qui Tam pros. is for the crime & for the punishment & that to be incorrect - for in popular actions the penalty is not intended as a satisfaction for the injury done, for it may be sued by a person who has received no injury Cro 60 Cro E 480. Sal 162. B.N.P. 179. Cro 6 10. 4 Bur 2526

The truth is this distinction is founded on the different forms of Act - an Act for the penalty is founded in Debt - & of the Act is of three. They can be charged only to the amount of the debt, or penalty inflicted, Whereas upon Indict or Inform the Act is form as well as substance is crimi. the Indict or Inform is prosecuted in the offence only & expressly, it does not bring into view any thing in the nature of an implied contract, like the former Act.

On the other hand several acts may often do constitute but one offence: & there are cases in which one act constitutes several distinct offences as cases of felonies. In cases of the first kind there can be but one penalty inflicted, though the pros be public. Thus upon an Indict"

KB3

Mr L. Offence } in K.B upon a Sabbath act-
it was contended Deft was guilty of several distinct
crimes for he worked all day Sunday, but the Ct
held that as he was employed all day at his usual
employt all the acts done being connected, con-
stituted but one offence Cowl 641

Indeed there is an essential diffce between the
act complained of & the offence. — A physical act
needs no definition — it is the nature but the
action, — out of wh the offence arises — The
offence is the character wh the Law attaches
to the act — Hence the above distinctions.

Jos Jofr

actions the Plff is entitled to no costs unless
they are expressly given him by St.

But when the penalty is given to the in dividual
injured — he recovers the costs upon conviction
— for what he recovers is for the injury received
& is in the nature of a civil action

But on the other hand he
who sues in a popular act is supposed to suffer
no injury, & therefore he has no ground on wh.
to recover a satisfaction 1 Ba & Ad. 511. 5 T. R. 2 Burr
968. Sal 206. 1 Wms Saund 10. Bullock on Costs 19. 200-1

Jos Lowe

the Justice always receives costs on conviction as in
all civil cases — & he always pays costs when
Judgt goes against him

Finis

The Domestic Relations

Master & Servant

A Servant is any one who is subject to the personal authority of another. A Master is one who exercises that authority.

To constitute this relation it is that the authority must be personal. For subjection to civil authority is not servitude more than subjection to the Laws themselves

The case of the Master over the Servt is generally founded in contract, tho not always. I say "not always" with reference to certain species of servitude not known to the Col.

In Con there was one species of servitude which was unknown to Col. it was that of the Delto to the Confed. and also existed Slavery in some of the other States but it is now abolished

The species of servitude now existing is two & indeed in most of the States are five. 1st Slavery. — 2d Apprentices — 3d Menial Servt — 4th Day Laborers. 5th That class of qualified Servts who come under the general denomination of

Agents

Mast & Seam } Agents as, Factors, Brokers, Stewards, Vendue Masters, Clerks. Stewards Bailiffs, Ship Masters, Attorneys, indeed all who come under the character of personal agents of another come under this class - 1 Bl 423. 427. 1 Wils 464. 469.

As to the class of Slaves, it was wholy unknown at C.L. 1 Bl 423. 1 Woodes 464. Sal 666. The leading case on this subject is in Lofft 1

It has been doubted by many distinguished Lawyers whether Slavery has ever been legalized in Comm. Jeon- fess I never could find a ground for it. Tho' in one or two instances Slaves have set their Masters at defiance - & the dispute was terminated by a compromise. — If it ever has existed it must have been sanctioned either by the Natural Law, the C.L, or our own Local Laws

In the present age it has ceased to be a quest whether it could be sanctioned by the natural Law - for plain by it contrad see the subject handsomely discussed in 1 Bl 423 & onwards.

It is perfectly plain that Slaves are not known to the C.L.
And the Local Laws of any foreign country in favor of Slavery can never be enforced in England Indeed it is a max of the Eng Law, & one much

Mart. v. Lew. Con. L. 3 boasts of by Englishmen, that a foreign slave on landing on British ground, becomes ipso facto free, i.e. is protected in all the rights of a freeman Lofft 1. Sal 424. 666. 1 Burr 796 n.m. The case in Lofft is one in wh a West India gentleman took with him his slave to Eng. The slave left him under the protection of the laws the master caught him again & got him on board ship. from whence he was taken by the civil auc. & liberated

There were in Eng under the feudal laws what were called Villiens, but they were never absolute slaves. but were attached to the land as a kind of stock — and the Lords had not that power over, wh in various parts of the U.S. the Masters exercise over their slaves. but they were owned by a kind of tenure, wh was called the tenure of Villenage — This tenure was annihilated by a St of 12 Cha 2. but this character was hardly known in the time of Eliz, & at the time of making the St. it is said there were but two Villiens in the Kingdom 2 Bl 94. 96. Lofft 6. Litt sec 189 194. 204, 3 Humes Hist Eng. 314 &c—

The only remaining point then as to the equality of slaves in Con. is whether it has been sometime by our Local regulations, It seems strange how this could ever have been doubted but that it has been. It is true we have no

Hall 4 Hoot. Slavery has [illegible] not at present only authorising it, but we have the sanction of the acquiescence of the Legislature ever since the settlement of the State. We have several Statutes relating to the subject, providing for particular punishments for Slaves. — Alleging, more to maintain them, than what is just and common, & providing the mode in which they shall be emancipated so as to relieve their Masters from longer maintaining them — We can find ten times as much Law to prove that Slavery has been legalized in Con. as to prove that a man has a right to his own house 2 Dev. Con. 141. 2 Hawks. 337. 396. 399. These statutes are now repealed but this proves nothing against my positions. Our Judges have often recognised the Slavery — we have not many reported cases of it, truly, for the reporting of our State decisions is a late thing — but the cases are within recollection of most People 2 Root 364. 517.

It has indeed been decided that the Master could not maintain trover for his slave — & this because he has not a property enough absolute in his slave to maintain this action — But he has an action for enticing away his slave. — So slave may be sold that there is ground to justify this decision see 1 Dal 66. 2 Ld Ray 1274.

But which Slavery never has existed in Con. even practically. — The Master never had however the life of his slave — and it has been decided

Mort. v Lee Cases in ; that the slave could bring
an action by next friend, & this even against
own Master.

It has been decided by our Supr Ct
that the marriage of a slave with the consent of
his master is an emancipation — because the
slave contracts with the consent of the mast.
a relationship which is inconsistent with a
state of slavery. I know of no cases at Ld
not are such in point but there are is somewhat
thing analogous in 8 Gr 356. 2 Bibb 511. 3 Ba
547. as relating to the emancipation of Minors.
The case of a Brief (a female
villein) is analogous. It is said in 1 Eng Books
that a Brief is not emancipated by marrying
a villein — whether this is altogether by the consent
of Ld Master or not is not said, but I should
think Lord has been laid down — vide Litt.
Lect 187. 2 Bl 93-4.

But on the other hand
at Ld a Brief is emancipated during coverture
of the marries a Freeman — & for ever if he
marries Ld Master 1 Inst 123a. n 3. 136b. 137b.
Perk sec 914. How for these and-
ogies will affect the quest in this country I
dont pretend to decide.

It has been made a quest-
ion whether the illegitimate issue of a Slave is to be
deem'd by birth by the Civil Law the child was
of a slave, the rule is. partus sequitur ventrem

Mart. Sect. Slavery.] In Eng by the feudal law the child follows the condition of its Father, and a Natural Son of a Father in the Army, of the Law not following the condition of his Mother, it could not be a slave. In this state Southern the feudal Law has been followed. for the feudal Law see 2 Bl 93-4. Litt sec 187-8.

In Con however Slavery is nearly abolished by Law. All children born after March 1st 1784. are declared free at 25, & all after 1st August 1797 are declared free at 21 years of age. Sts Con 623. 626

The Importation of Slaves is declared void & prohibited by every State in the Union. But the Transportation of them from one State to another is not prohibited by all. Con till lately by Statute which now prohibited it

It is an agreed point in all that offenders may be judicially condemned for slavery for crimes, as in N. State to hard labour in Red Gate. This however is a peculiar species of slavery, the Master in such case is the agent of the Law only & the Offender is a slave to the public.

Servants of the Second Class are called Appurtenances they are so called from the French word "appurtenir" to learn for they are usually to wait to learn some mystery or mechanick art of their Masters. This duty may

Apart. & Nat. Appren may be bound to husbandry & As Do the duty of Parish Clerks & be bound as Apprentices. 1 Bl 426.

By 43 Eliz. every Appren tice must be bound by Deed & by Dis. Executed Parol contract then is not binding under this St. Salk 66. 6 Mod 162. 2 Ray 1117. 5 Ba 546.

how can a departure contract be construed into an hiring by the year 5 Bac 379.

It has been said that the contract is not binding, unless this relationship be specially mentioned — but this is not law — for the intentions of the Parties being Apparent, the Deed will bind 5 Ba 546 1 Burns J 57. & 5 Bac 379. 1 East 553-4

all other duties may be retained by parol contract 5 Ba 546.

In Eng there are certain Local Statutes authorising the Overseers of the poor to bind out the children of poor persons; and these indentures are binding & obtain upon the children notwithstanding their minority 1 Bl 426. — Ehen St can be of no use in this country unless it be analogically

We have similar St in Con authorising the Select-men with the consent of a Justice to bind out the children of Parents — Boys till the age of 21. Girls till 18. St Con. 123-4. 552.

Mas. & Ser. Appr. } All Servts & Art.
Appr: are regularly entitled to Wages i.e. of course
unless there is a special agreement to the contrary.

In Com. the Wages of all Servts are settled
by compact. It is not in Eng as to Menial
Servts but, as to those who work at Husbandry, they have their wages settled by the Sheriff
— Power of no Ct like this in the N.S. 10 Mod
428. Apprentices on the other hand are entitled prima facie to no wages, by contract they
may become entitled to them, but the Law implies no such contract 6 SR 379.

By St 5 Eliz 4
it is enacted that Minors may bind themselves
by indenture of Apprenticeship, but the Ct has
cautiously construed this St that the contract
does not bind them, the only effect of it is, that so
long as the relationship de facto exists, the parties
respectively enjoy the rights & service of each other, but
the Minor may depart when he pleases. The Master
loses his time and he is freed of his trade & gains
a settlement Cro C 179. 448. Cro J 497. 1 Bl
426. Doug 501. 4 Esp 216. 5 ER 716. Contract Infra
Com.

But if the Father or Guardian joins with the
Minor, the Father or guard. becomes at C.L. bound
by the Indent^re and it is laid down generally that
the Father or guard^n is liable for the non-performance of what is stipulated to be performed

Mas. & Lew. Appren. by the Appr. & Mod 190
Day 501. or 515.

It has been decided however in Mass. & when the indenture is in the common form the Father is not bound for what is stipulated to be done by the Appr. But if he binds himself by a sweeping clause as "for all the covenants" in the Indenture he would be bound 2 Mass 225.
This doctrine appears to me to be a very questionable point. Indeed I cannot see for what purpose the covenants are introduced, unless it be to bind the Father. It is clear the minor is not bound by them if the Father is not, the covenants must be entirely nugatory

The Master forfeits his rights by the abuse of the Appren. & it is laid down in the Books that misuser is cause of departure This rule however is vague, for although the Appr. is not oblige to bear abuse, still it cant be the case that for any little misuse he has a right to depart, — but I dont know that the rule could be mended, it must be left for the judge & the jury upon the particular circumstances of the case 1 Atk 515. 1 Bl 425.

This laid down in the books that an Appr. can be discharged in no way except by Ind Sol 6 Co. 6 Mod 162. 2 Ray 1117 & Bac 45. The account of the rule I take to be this. That an Appr cannot be discharged by any agreement not executed unless it be by Deed

Mast. & Ser. & Appr. } Deed, is no verbal discharge will release him, for that can amount to no more than a covenant & if the Master retracts he will be bound to remain, but if a verbal agreement is made for the Appr. to depart & he goes & executes it before the Master retracts, it is binding. Case decided in Com. on this point. Leigh-ever vs. Bur. Sett. Ca. 542. 1 Day 153. 3 Day 126. 1 East 619. 630. 1 Bl R 638. 2 Bl R 574

2d Gr Cancelling the Indent. or delivering it to be cancelled is a discharge. This recepts follows from the cancelling. It is true there are some cases in wh. the power of the Deed remains altho it is not to be found, but they are cases when the Deed was lost, or destroyed by accident. Stra 542. 2 Bl 903. Bur. Sett. Ca 511. 274.

It has been said that the Bankruptcy of the Master is a discharge of the Appr. ipso facto — but this is not Law. The Act lets wh. have accr. over them (wh are the Act of qua. Sess Corp. & County &c) County rate or appl. made grant & discharge on this ground. Stra 562. 1 Atk 149. 3 Ba 550.

But it will discharge the Appr. also on the default of the Master covenants by it have accr. to him at the Appr. for misconduct towards his Master. Co Lit 294. 3 Ba 550. 1 Bl 426.

If the Appr. marries without his Masters consent he cant on this ground be turned away, but the Master is

Mas. & Ser. Actn. [illegible] is entitled to a remedy on the Indenture, for every Indent contains an express covenant that he shall not marry - but I rod be the same I presume if there was no such expr. rep cont 2 Ves 492. 3 Ba 550

A Contract of a Fiduciary Nature is called in the Language of Law a fiduciary cont. i.e. a cont founded in the confidence of the Father in the Master, therefor the Master cannot assign the Actn. to any other Person. Indeed as a gen Rule Fiduc cont are not assignable, neither are the Rights growing out of them. By the custom of London however the Actn. may be assigned - but it is in this country 2 Ves 194. 2 Lal 68. 2 Mod 553. Doug 69. 1 Rich 250. 3 it 519.

And an award of Arbitrators that an Actn. shall be assigned is void unless it be by the custom of London, or by the consent of the Actn. 2 Str 1207

But tho at Law the assignt of the Actn does not keep the Master right & Interest in the Actn. still the Cont is good between the Master & Apprentice & if the Actn does not serve the assignee the Master is liable to an Action but if he does serve he has all the rights he cd have under his master & at the end of his time is free of his duties. But the Actn is not bound to serve & he neither can he maintain an action on Indent. 2 Ray 1533. 2 Lal 68. 1 Wils 95. Doug 69.

Mas & Ser. Appr. 3

And on the same prin
that he cant appr. the appren. the Master is
bound to keep him under his own care, he cant
send him abroad even to perfect him in his
trade unless he made some contr to that effect
or the nature of the trade requires it Hol 134
139. 8 Mod 236. 12 it 446

On the same prin the Rep-
resentative of the Master on his death cannot turn
the Appr. for he was bound on the confidence had
in the master & this right is not transferable
2 Vin 39. Sal 66. L Ray 683. 1 Sha 1267.

How or the
same prin is the resp. obliged to treat the appren.
according to the understanding of the Master
De contra to this was once decided - but is cant
be correct, for it is contrary to the leading prin.
of the title, see the last rules 1 Lev 177. 1 Sid 216
contra 2 Sha 1267. Walt Cart 295. Sal 66.

Whether
the Ex is liable after the Masters death to furnish
clothing, board & other necessaries to the Appr. dur-
ing the time wh he was to serve, I am quer.
- according to the current of cases he is liable
how it is very true that this part of the contract
is not in its nature strictly personal & these
necessaries may as well be furnished by one person
as another so long as they are good &c. but as
these necessaries were according to the original intent
of the parties, to be furnished for the service per-

form

Mar. & Seal. Supp. 2 Supplt, 1 Venus Epharmony that the Ex. shd be compelld to furnish these things since the Supp. may have the shp immediately on his Masters death. 3 Sal 41. 1 Bid 761 820. 1 Sid 216. Ord Ch 553. The same thing has been decided in Com. 1 Day 30.

In Eng the Ct of Ch has been of that a part of the premium should be returnd when the Master had died shortly after the commencement of the service, In such case (of premium having been given) it is apparent that justice demands something shd be done & the restoration of the premium wd be the proper Rule. If this is done, the Ex ought not to be compelld to give him the wages

In one case they have gone so far as to decree that a large sum shd be restor when a large one had been given, the express ation — this seems too much like ordering a new contract 1 Vern 480. Finch 396. 1 Salk 149.

So also if the Master who has received a premium turns away an Supp. even tho for a proper cause may be compelld to restor the premium in part.

If he turns him away for an improper cause I think the whole premium shd be restored for the consideration of the premium was destruction in the trade 2 Vern 64.

So when the Master became a Bankrupt & thereby the relations ship

Mes. & Ser. Appr. Emolestations his was destroyed a part of the Prem^es has been restored by St. 10 & 11 W. 3. c. 14. 1 Ba 551

And in Eng when the Justices at the Sess^s discharge Appr^s it has been customary for them to order a restoration of a part of the premium — But how they could do this I cannot see for they have no equitable aid, but as it has been acquiesced in so long it has now become Law 1 Str 426. Sal 67. 490. 1 Salk. 67. 1 Ld Raym. 62 11 Mod 110.

Whatever the Appr earns during the time of his apprenticeship belongs absolutely to his Master and an apprenticeship de facto is sufficient to give the Master this right. 1 Ba 552. 1 Dust. 117 Ld Raym. 12 Mod 415. 1 Ves 248. 83. 6 Mod 69. Sal 68.

It follows then that whatever property the Appr may have acquired during his time of service may be taken poss^n of by the Master & he may recover it by any proper form of action. This rule holds equally well whether the Appr^s was contract with or without the Masters consent or whether the service was within or not the time of his indentures 1 Ba 552. 1 Dust 117. 11 Mod 415. 1 Ves 248. 6 Mod 69. Sal 68.

The right of the Master is confined to property earned by his labour, for if the Appr should have poss^n come to him by Descent, Gift, Purchase &c the Master could have no claim to it.

Mas & Ser. Apps & Rents Law has a right to what the app attains by finding, this decided in a case where the app. found a Diamond Ring - which he carried to a Gold smith, who pronounced it to be of inferior value & bought it of him the ap was bound to answer it on the Fraud.

These rules as to services apply to no other kind of Servt & apt Slaves !!!! & if any other kind of Servt earns wages or acquires profits by working for another the Master has no claim to it. This is the case as to Menials. But if he has left his service improperly & is employed by another who knows of the masters claim to his services an act will lie both against the Servt on the contract. or agt the person employing him. the act is on the case for quod servitium amisit 1 Ba 557, 559. 2 Lu 639 Bac J 553. 1 Just 117a. 2 Rol R 269.

If a servant of any kind or app is enticed away from the service of his Mast an act will lie agt him enticing per quod servitium amisit Cow 56. 3 Da 567.

And it has been decided that a journeyman is a Servt within this rule & an act will lie agt him enticing Cow 56. 1 Wooden. 469. a. 3 Bin 20. & this whether he works by the time or by the job.

As to the form of the act if the Servt is taken by force

Mar. & Ser. 2 Ph. 5 his paper good while he lives but if he runs into debt away it will be thus Baron the case. Fallow Moore is one case reported with mistakes with this rule but I have always had strong suspicions that it was not correctly reported it is in Cod 55 see Roy 155. 2 Roy. 1032. 1117. Hal 3 vo. 23 R 167.

By a rule of the Eng Law. the Off gains a settlement where ever the last 40 day. It is a Law or Civil Rule, by by the Ct this could not be for he is not capable [illegible] to gain a settlement until emancipated 1 Bl 423.

The Rule in this country is directly the reverse, here a Minor cannot gain a settlement but his settl. is in the place where his father lives if his Ors. if he becomes a pauper he is remanded to the place where his father lives Ct Con 246. 4 Roy 189.

We have a recent Stat in this State providing that if an app. or other servt absconds during his Minority without sufft cause he shall be bound after full age to ans all the damages sustd by the Master in consequence of his departure - This is the only Statute I know of taking away the priviledges of Minors. - Or I think a most pernicious one Lt Con 82. 118

Menial Servants are the Lev by of the 3d class. & are so called from their being employed in[illegible] mania.

Mas. & Ser. Memd. There are but one or two rules applying to them exclusively, as the rest of them under the gen. Rules first applying to all Sert.

It is a rule of Eng. Law, as to Mens. Ser. that if the hiring is gen. i.e. no particular time specified, it is construed into an hiring by the year upon the principle that the Master shall maintain & the Ser. serve thro' all the seasons of the year. & the Master cant turn away his ser. without a quarter notice 1 Bl. 426 1 Bl. 646. Peake 16 8. 1 Dent. 42. No such Law in this country.

But it is a rule that they turn'd away at any time for any moral turpitude 1 Bl. 426 & this notes.

Day Labourers. are of the 4th class.
I do not know that there is any one rule of Law applicable to this species of Sert. & only such as are made by St.

An Eng St. provides that all persons having no visible effects may be compelled to labour. & the Justices of the Sess. settle the Wages. & the Labourer cant exact more or the Master who pays more is liable to same Penalties. Nor can the Masters cant dismiss them 1 Bl. 426 7—

Agents. The last Class is that gen. Clerks consisting of all those who are called Agents such as Factors. Brokers. Scrivenors &c.

Mast. & Serv. Agt. } Every Agent is a gratuitous Servt a servant to his employer or principal. He is a Servt indeed in relation to such acts & such acts only as affect the property of his employer 1 Wood 469. 1 Bl 427. Amb 252. 2 T.R. 4.

For these cases the Prin. has by no means the same controul over the Agent that the Master has over the common Servt, but the Agt is bound by Law to act for his Prin. according to the terms of his contract

In relation to the rights & duties of Agts & their Masters, the Gen. Rule is, that they ought strictly to pursue their commissions, & indeed this they should do for their own interest as well as for that of their employers for when they do this they are not liable for any casual loss, but when they do not pursue their commissions 1 Wood 469. Com. Dig. Mercht B.

Factors or Brokers. a indeed Comm. Agts generally may retain the goods of their principals in their own hands to satisfy a gen. balance of account in their own favour, i.e. as it is said they have a lien upon these goods. But by voluntarily giving up the goods to his Prin. he loses his lien, for a lien upon Per. Prop. is founded upon actual possession, so if he surrenders the poss.n he loses the lien with that upon which it was founded Amb 254. 1 Burr 493. 2 Ld Ra 1154. 1 East 935. 4. 2 East 227. 523.

Mas. & Ser. Agents §

And a comm'n Agent

has the same lien upon the price of the goods sold in the hands of the Vendee. Thus if a Factor sells the goods of his Prin. & g. s. upon credit, he may require J. S. to pay the money to him. & not to the Prin. & if after such notice he shd pay to the Prin. he will be liable to pay the debt ag^t to the Factor Com 251. 256.

But he has no lien upon the goods until they come to his actual poss^n Hence after the goods have been consigned to the Fact^r the Prin. may countermand the consignment or stop them in transitu 2 Vern 117. 1 Atk 134. 3 P R 119. The amount of the rule is this that the goods do not become a pledge until actual delivery for poss^n is necess^y for the existence of a pledge — These rules are founded on the Law Mer. Com Dig Merch.

If the Fact^r buys up in quantity or quality, or pays more than his com^n warrants, the Prin. may disclaim the purchase and if he sells for a less price, than directed he himself must bear the loss. 1 Ves 510. Com D. Mer. B.

The Factor has no right to pawn the goods of his Prin. as his own. i.e. for his own debt. And if he does the Prin may reclaim them from the pawnee But it was once decided, that before he could reclaim, it was necess^y to make a tender to his Factor of the balance due. But it seems now that no such tender is necess^y.

Mas. & Ser. Agt. } indeed the pawning by Factor
is a forfeiture of his own lien 6 SR. 614. Stra 1173.
1 Atk 382. 1 Bro 645. Com. D. Merc. B. 7 Cas 5. This last
is the case in wh it was decided, the tender is unnecessy
& a distinction is here taken between pawning the goods
as his own, & pawning them with notice of the lien
only, in wh last case it is held the tender shd be made.
A Factor
however may sell the goods of his Prin. for merchan-
dizing consists in buying & selling, & the purchaser
will hold. A Fact may sue in his own name &
also sue in his own name to recover the price
As a gen rule Ser cant sue in their own names
but Comer Agts can, the reason of this is said in
some of the Books is, that the Agt has a beneficial
interest in the goods — but this is not the true reason
for com Ser may have sue on account, the true
reason is I suppose because they sell in their own
name Cow 256. 1 Atk 382. 962. 3 M.C. 130. 1 SR 119.
5 Vin 359. 2 Esp. R. 493. 1 Chit 85.
The same rule holds as to Brokers. Factors
Ship Capts. Auctioneers. A indeed to Com Agents
generally & p. the same reason 1 Chit Pl. Park In.
403. 1 Atk 91. 2 id 291-2.

In all the preceding cases
however the auctions may be bot by the Principl
i.e. the Prin. or any owner in all cases, except that
in wh the Factor has ordered the Vendee not to
pay Prin. But there can be but one recovery.
1 Atk 91. 5 SR 359-360. na, 1 Chit. R. 5.

Mas. & Ser. Agts

An Auctioneer is not liable for selling goods to the highest bidder, tho for a less sum than directed to be sold for by the owner, for the act of selling at goods amounts to a contract with the bidder that he shall have them unless the contra is made known to him. But if the Auctr is directed to sell the goods up at a price specified, he is bound to do it. Cowp 395.

Attorneys have a lien upon the papers & funds of their clients for their fees, & may detain the adverse party to pay to him & not to the client & if he does pay to the client he must pay over agn. But is with counsellors as such. But the right of the Att'y is subject to all the equitable claims of the adverse party. Thus if he has a set off to make, he may make it notwithstanding the Att'ys right Doug 100. 238. 2 Bl R 926. 4 BR 123. 6 id 361. 456. 7 id 40. 571. 1 East 464. 1 B&C 24. 122. 217. 657. 2 id 440. 587.

As to the manner in which an Attorney is to execute instruments as Deeds & for his principal see title Deeds. Hob 210, 2 Ld 768. Sta 705. 2 Ray 1414. 5 BR 177. 1 id 188. Obst B 324 27. 56. 75. 2 East 142.

A Agt cant bind his Prin. by Deed without an express authority given him by Deed. 7 BR 209. 209. 4 id 313. 2 Roll R. Com D. Att & A. 5.

An Agt who contracts for the Prin is not personally liable on

Mas. & Ser. 69 } his contract. Thus if the Secretary of the Navy contracts for stores & materials for the Navy is not personally liable on his contract. This case was decided in this State some years ago. Mr Dep. Secretary of War found a building for a War Office, & contracts to return it to the owner when the case had expired in as good order as when he took it. The building was burned down, & the owner was told by Mr D. A. A. was held he was not to suit, the remedy in such cases is by an application to Government, & it is presumed it will always do justice 1 Bl. 172. 6 T.R. 1 East 552. 1 Root 89

Rules relating to Servt generally. And here our first enquiry is in what cases is the Master bound by the act of his Servt & in what cases he may avail himself of the act of his Servt.

The first Rule is, that whatever the Servt does by the Master express or implied command, is in legal judgt the act of the Master, & in general all acts done by the Servt in the business in wh he is employed is done by the Master. 1 Bl. 429. 2 Bl. 442. 4 Burr 109.

Whatever the Servt does by the express command of his Mast or the Mast permits him to do, or whatever he does in the scope of the general authority given him comes within the first Rule. for these acts are all done in the performance of the business in wh he is employed by the Master.

Hence a contract made by the Servt the Master

and

Thomas v Lee. Gen Rules & authority to make contracts is in legal contemplation made by the Master himself. And if a third person makes an agreement with the Servt as such he is bound by it - and the Master may sue on it. 3 Ba 559 2 Str. R 411. Godb 366.

If the Servt is cheated of the Mast. property the Master may recover it by an action ag[t] the wrong doer as if he had been cheated himself Cro J 223. 1 Rol 94. 3 Ba 559.

If a Servt is robbed of his Masts property in the absence of the Master either the Master or the Servt may sue Cro Eliz 819. 3 Mod 289. Lit 203. 11 Co 82. 12 H 54. The reason usually assigned for the right of action in the Servt is that he is liable to the Mast. for the prop. but this is not the true reason, but the true reason is that the goods in the Poss[n] of the Servt the Master being absent, are considered as his goods ag[t] all persons except his Mast. - he is in the character of a Bailee 1 Rol 105. Cro J 265. And in a case of this kind a recovery by either the Mast or Servt is a bar to an action by the other. Or a commencement of an action by one is pleadable in an action to the action by the other. A second case I depart the is to action might thus obtained by the other

When the Servt sues in case of this kind he declares as a Poss[r] as of his own

Mar & Ser. qui Vales } this for this may never arise
3 Mod 2 99. 2 Saun 379. Sal 613. 3 Ba 67.

But, if property taken from the Lt in the presence of the Master the Master alone can sue, & the reason is that the taking is deem'd to be taken from the hop of the Master 1 Wms 148. 2 Salk 145, Sal 613.

If the Masters money is procured from the Lt upon an illegal contr, the Mast may recover it back. But if the Lt squanders it away there being no fraud in the person the Mast can never recover it back, the reason is the 1st gives the Lt the power of dealing, the seller & there was no fraud or fault in him, the Lt alone was guilty & the prop of the money by y Lt was good ground for the seller upon 3 Ba 559.

There is a variety of Rules relating to Indirect Lets for them see Stat of Frds & Limitations & the gen Doctrine may be seen in 1 Bl 426. 1 Rol 2. & 10 82.

If the Lt does an unlawful act at the command of the Mast both are liable — The Lt because he is not obliged to do an act that is unlawful even at the command of his Master — The Mast because he procured the act to be done Qui facit per alium, facit per se, 1 Wms 328. 1 Bl 430. Salk 550. 386. 3 Ba 563.

But it is said that if a Lt in obedience to his Masters command is instrumental in doing a wrong, & not be aware

Was. Vide Gen. Rules } ignorant. he is not liable
but the is not of gen. application, but applies on-
ly to those acts wh are harmless. A man was
guilty of false imprisonment by locking a
mother in a room. - he gave the key to the Lst
with direct to surrender it to no one but him-
self. It appear that the Lst did not know any
one was in the room - the Ct held he was inn-
ocent. & that he was but an instrument. 5 Bac 363.

The rule can apply only to cases wh are
in themselves harmless. it certainly cant hold
as a more gen rule for if he is guilty of any
unlawful act, or of any forcible injury he
certainly would be liable. For it is an uni-
versal maxim that he who does an unlawful
act is answerable for all the consequences
that ensue in the case of a forcible injury, the certa-
inty is liable for the law in such cases does
not regard the intent when a civil remedy is
sought. for this will lie for an accidental
injury 2 Bl R 892. & onward. This case is distin-
guished that the intent is not regarded. suppose that
A directs his Lst to cut timber on B land, the Lst
supposing it to be A's, the cuts the timber - the Lst
is liable beyond a quest. & as he does it ignorant-
ly he has an act of his Mast.

Those acts of the
Ser'nt done by the Masters command either express
or implied, are now in Law deemed to be the acts
of the Master. Neither can the Mast avail himself

Mas. & Ser. Gen. Rules } Thus if the Ser. commits any supposable wrong without the command of the Mast either express or implied. the Mast is not liable. So if he makes a contract without authority 2 Sal 282. 1 Bl 431. 3 Bl 533. 1 Show 224. 3 Bac 562.

Or suppose the Ser. leaves his work in which he is employed, & goes without any command & commits a battery. the Mast is not liable

On this principle it has been lately decided, that if the Ser. employed in his Mast business commits a wilful injury to another, not in furtherance of his Mast-business, & not by his command, the Mast is not liable. Thus driving the Mast carriage against the carriage of another, the act being wilful is not in furtherance of his Mast business, & the Law implies no command. 1 Mast. 1 East 106. 1 Bl 492. Sal 441. 3 Bl 762. 2 Bl 154. Contra 1 Woodd 465. but this last is plainly a mistake

Now I conceive that when this case of East. first came out, it struck me as a plain violation of principle - I must confess was the effect of it upon the whole profession. I could not see why as the Mast was liable for an injury arising from the negligence of his Ser. he should not be for his wilful acts or injury. but I am now thoroughly convinced of the correctness of the decision. for in the case of negligence in the Ser. the commits an injury

Where a Servt [illegible] he is in pursuit of his Mast. business & has no other object. But when he commits a wilful injury he is not in pursuit of the Mast business, or acting in obedience to his orders. It makes no diff whether the drives the carriage agt Plff, or uses a stone or his Masters Whip or takes a Pistol out of the carriage & shoots him, the Carriage in this case is merely the instrument he uses. Previous to this decision the Profession had no doubt but an action would lie for the wilful injury of the Servt agt the Mast. & it has been a dispute whether the action should be trespass or case, in 6 DR 129. it was decided that the action on the case did not lie, — but in the case 1 East 106. decided that no action in this case will lie agt the Master. ———

Observed that for the wilful acts or torts of the Servt when employed in his Masters lawful business the Master was not liable if done without his order. But for the injuries arising from the negligence of his Servt he was liable. For the Mast must at his peril employ faithful & careful Servts. But he is not accountable or he is not an Insurer for their unruly passions, or acts done not in the performance of his business. Thus the Servt drives the carriage of a rich wilfully, the Master is not liable, but if Servt does thro negligence, the Master is liable 6 DR 129. 9 id 648. 2 BOR 442. 1 East 106. 1 BL 431

Mas. & Ser. Gen. Rules. Hence when a Ser. negligently drove a car & dragged a pipe of Wine, and again negligently ran against a boy & injured him, the Master was held to be liable 2 Ld. 441. 2 Ray 739. 1 Woods 465.

So also it was determined that when the Appren. of a Surgeon injured a person from negligently keeping his wound the Master was liable.
So also the Appren. of a Blacksmith of Lancd the Lame Leg was shoeing — the Master was liable 1 Bos & Pul 373. 1 Bl 431. 3 Ba 560.

This distinction as to the Master liability, arising from the wilful or negligent injury caused by the Ser. has not till lately been decided. — The history of it is singular. It was once the idea of the Profession and also of the Judges, that an action did lie against the Mas. for the wilful injury of the Ser as well as for the negligent. But on an investigation of the subject caused by several suits which in succession arose the contrary was decided, altho it was an agreed point that the Master was liable in a proper form of action. The case which led the way to this decision is in 3 Bl 125 which was laid in Mas. on the case for the wilfully driving the carriage against another & the C. held that the act did not lie but it should have been Mas. vi et armis. A year after this an act was but declaring in Mas. & the Court held that tho on the case was the proper act 2 Bl 442. 5 years after this, the C. held that no act at all did lie for the wilfully doing. 1 East 106

Mas & Ser. Gen. Rules 3 1 Bos & Pul 472. The various opinions upon these cases would quite a guest whether this or the case was the proper action vs Mast. in the case of the negligence of his Ser. My own opinion is that the decision in 2 Bos & Pul 444 is correct & that this case is the proper action but this is directly opposed to the opinion of all the Judges of K.B. as given in 5 T.R. 125. for there no distinction is made between the wilful & negligent injury. I can see no satisfactory reason why there should be a difference between the action vs the Sheriff for the torts of his Deputy Sheriff, & vs the Master for the torts of his Ser. but it is decided that this is the proper action vs the Sheriff for the tort of his Dep.; I think the same action would be applicable to both cases; The reason given for this is that the Sheriff & his Dep. are but one person in law, but this is a mere fiction of law & are no more so than the Mast. & Ser. 2 Bos & Pul 432. 2 Keb 552. The ground of my decision is, that when the Mast. is liable for the acts of his Ser. it is on the ground of negligence in him, in employing such a Ser. & putting him in a situation for doing mischief. & he is liable on this ground. Case is the only proper remedy, for the injury committed by him is consequential the Ser. himself should be sued in Trespass. but the Mast. in Case.

If a Ser. employs in his masters business another Ser. & this last commits an injury to a 4th person. the Master & the 2d Ser.

Thos. v Ld. Gen' Rules } are either liable but not the 1st Ld. for the first or intermediate Ld's not the person committing the injury if he is not considered as a master to the Ld's or the one he employed, but only as a Ld's employ & the other for his Mast. Thos as the Ld of B employs C to do B's business & he injures D. B & C are liable & not A. 1 B & P 404. 6 Bac 211.

The Rule that the Mast is not liable for the wilful torts of his Ld is not universal, for there are cases in wh he is liable. but in those cases State it that he is not liable for the tort as a tort, but for the consequences, & this is when the tort of Ld amounts to a violation of a contract express or implied between the Mast. & the person injured Thus if the Apprentice of a Blacksmith, wilfully lames a horse he is shoeing, the Mast is liable for he has existed an implied contr with the owner of the horse, that the work shall be done by a skillfull & careful person, & if there is a want of either of these in the person employed he is liable himself. as if a Surgeon Ld unskilfully a coat 8 Bac 165 6 2 Ray 910. 1 Bac 158. Jones a Hault 73. 74. In all these cases the ground of the Mast liability is the violation of his own implied contr & the act is not his, for the tort, but for a breach of his own contract. — Is not this strictly an exception to the 3rd Rule, that the Mast is not liable for the wilful torts of the Ld.

Mar & Ser. Gen Rules 2 3 — A. A. the Gen Doctrine
of the liability of the Sheriff for the acts of his Deputy
see Ast. — Sheriffs — The Deputy Sheriff is prop
erly a Ser to the Sheriff.

It has two or three times
been determined that the Post Master is not
liable for acts of his Dep[t] or his subordinate offic
ers as clerks &c. The P.M. himself is what is call'd
a pub. officer or ministerial agent, & accountable
the Government. & of the P.M. such & acts as a
mail-the P.M. is not liable — He is not in the
etor acts of a com[n] carrier, for he receives no stipend
or emolument from the persons putting letters in-
to his office, & makes no cont with any indivd
for safety of his letters or the faithfulness of his Sers
He receives it is true a per centum sometimes from
Gov[t] upon the sums paid for the postage, but this
does not alter the case. his responsibility is on-
ly to Govt 2 Ray 640. 6 Mod 487. Com Dig 100. Sal
17. Com 764. 764.
The P.M. however is liable for his own default
as the Dep[t] is for his, for he is liable who does an
injury by his own act 1 Wils 443. Com 765. 2 Str 1
906.

And an act[n] of indet. ap[t] will doubtless lie ag[t]
such officer for extortion. i.e. by his own act Com
162.

In most of the to these Cases the liability of the
Master for the [illegible] of his Ser is alone considd
as to his liability in cases of cont made by
Ser

Mas & Ser. Gen Rules 3 the Lect, the Gen Rule is the Mast is bound by the contract of the Lect when ever the Lect acts within the scope of an authority delegated to him by the Master. & this is the case whether the auth is express or implied & in such case he acts for the Master 2 Vern 543 643. Com 6450. 2 Ray 924. 3 Lal 234. 2 Str 757. 8 Mo. 591. 1 Bl 457.

A Gen auth & contract is one wh is not confined to any one individual & specific contract but extends to all contracts & to contracts of a certain kind. Thus if a man usually employs his Lect to purchase meat for himself & family, the auth is a gen auth.

A Special auth is one wh is confined to one or more individual specific transactions, as where in a particular instance he employs him to purchase an horse

A Gen auth may be & often is implied from the manner & frequent practice, as in the case of purchasing Provisions 1 Bl 430.

A Special auth may be implied, but such cases are rarer, as if for ex. the Lect shd make a contract in the presence or hearing of his Mast & the Mast shd not object to it. Note in such case the Mast shd be liable as if the implied auth. gen the Lect. 1 Bov. Cont 131-2.

The consequence of a gen auth is this, that if the Mast has given the Lect money with the Lect & purchases the articles & is

Mas & Lee. Gen'l Rule, he not be liable for what he shd take up on credit. But if he has usually permitted the Lert to take up goods on credit he will be answerable for all he may take up. For in the first case there is no implied contract with the seller that he will pay. nor any for the Lert to buy. But in the latter case he has given the Lert credit with the seller, & the Lert has a pub. am with him. 3 Sal 234. 1 Show 95. 1 Bl 430.

And if the Master has ever once paid for what the Lert has bought without any & with any expressing his disapprobation of it, he will be liable for all the after purchases of the Lert or those of the same tradesman unless he expressly order the contrary, for his not expressing his disapprobation gives the Lert credit with the Tradesman 1 Bl 420. Chris. Bates

And if the Lert upon any one either gen'l or spec'l buys goods for his Mast & they come to the Masters use, the Master is liable for the taking & using ratifys the contr by an after assent, which in most cases is as effectual as any prior assent. 3 Sal 234. Cro. 450. 3 Keb 625. Chit. B. 26.

But if the Mast had sent the Lert with the money & he kept it & bot the goods on trust, I doubt whether the Master would be liable. It is not judicially settled whether he would or not be liable, my own opinion is he wd not. For a prior assent to the Lert or a subsequent to the purchase is reas[onable] as by using

Mas & Ser. Gen Rule } the action lies to bind the Master.
In this case there was no prior credit to the Servant to purchase on trust. & it would be absurd, the using these goods wd be supposed paid for & shd be made liable on the ground of a sale, grant to the purchase on credit. The Books abound of this case with some doubt 2 Ray. 224. 3 Salk 234. 3 Bl. 760. 3 Esp 76. Peake's Rep. 46.

If the Mast has permitted his Lad to trade on credit he may save himself from subs cost by forbidding the Tradesman to trust the Lad further on his account. But he cant discharge himself by a private order given to the Lad for the Tradesman is entitled to notice of the order being withdrawn, or as the case may be of the dissolution of the connection of Mas. & Ser.
The Rule in all cases is, That the dissolution shd be made as public as the credit have given is supposed to have been 3 Bl R 760. 10 Mod 109. Peak. Rep 46. 154. 12 Mod 346. Chit. B. 257.

If the Lad in selling prop. wh he is authorized to sell makes a Warranty, the Master is bound by it unless he expressly forbade the Lad to make the Warranty, Caveat of selling a horse. But if there was no special authority, or prohibition to make the warranty. it is suffl. — the Mast. is bound. 4 Bl R 177. 3 Bl R 757. Stra 505. 553. Salk 289. 10 Mod 109. Esp Rep 111.

Mas & Ser. Gen Rules

When the Lessee acts within the scope of agency. any prop prohibition not made public & not known to the purchaser will not exonerate the Master. Thus suppose the Lessee of a Livery Stable rides a horse under a gen agency if he was forbidden to warrant & this not known to the purchaser, the master would be liable

Reason of this is that from the gen prac of the Lessee the pub may presume & safely so that the Lessee has the auc to warrant, — And it would be a plain fraud, & safe the door wd be known open for the entrance of fraud, the rule must as to allow a private order from the Master to bind him 3 Bl R 960. 10 Mod 109

So where a Clerk has been in the prac of warranting goods sold, & contrary to his Masters orders did warrant a certain article, the order not being known to the Purchaser, the Master was held bound 2 Bol & S. Sal 282. 289. Sha 653. 3 Ba 560 3 Bl R 757. 4 it 177.

From what is above I have always been at a loss how to reconcile the case reported in Cro J 469. Cro J 103. 2 Bol & S. 267. with principle. It is the case of Southern vs Hord. I mention it because it is a leading case & I dont know that it has ever been denied, or questiond even in the remarks of any of the Judges. The Master sent a counterfeit diamond by his Mg in Barbary who sold it to the King for a gd. The deception was soon discovered, & the Mg imprisoned, & the diamond remained entitled and by a

Mas & Ser. Gen' Rules 3 Dicens sale paid the price of the horse – the ~~case~~ action was brot agt the Master, involving a question of warranty – the concealment of known defects amounts to a warranty – The Ct held ~~that~~ he was not liable, for it appeared there was no express order to conceal the defects. how I could never reconcile this with Principle

The Mas & Ser. both knew the Disease and was defective, & that it could not be sold unless the defects were conceald. Now the Principle on which Ego is to the warranties of this kind the Master would be liable unless he gave an express order not to warrant

That the concealment of known defects amounts to a warranty see Esp Dig. 632. 2 Swift 120.

There is also another strange principle laid down in the case of Southern & Boyd viz. That if a Master sends his Ser. with an unsound horse to a fair without order to sell it to a particular individual, & the Ser. sells him for a sound horse the Master is not liable, but if he is ordered to sell to particular individual, & the unsoundness is concealed the Master is liable 1 Dal 99. 1 Esp Dig 143. 2 Ba 595. 3 Ba 560. But I cd never see the distinction between these two cases. If the direction of legal language amounts to this "If a man sets in motion an instrument of mischief & directs it at a single individual he shall be punished – but if he directs it at no one in particular, but into a collection of people intending to injure all he could, then he shall not

Bras & Lee. Genl Rules & Principles

A Lest is regularly not liable for the contr he makes for his Master. It is presumed in such cases he makes the Contr by order of his Master. He may however engage himself. & does by an express agreement in his own name & on his own credit. Thus selling an article & promising it in his own name 1 Rol 25. 2 Rol R 270. 3 Ba 563.

And unauthorized if the Lest makes in the name of his Mast. a Contract he has no auc. to make he himself is personally liable. In this case the Mast surely is not liable & if the Lest is not a great fraud may be practiced upon strangers.

The Rules regarding the Lest power of binding his Master applies in all those cases in wh a man employs another to transact business for him, but that other is not necessarily a regular Lest; for if he employs his wife, child, friend, or indeed any third person under an auc. either Genl or special that person is his Lest as to all those concerns to wh the auc extends — It is usual that the person he employs pro re nata 1 Bl 430.

There is a Statute wh has introduced a new, entirely unknown to the C.L. It is, That whenever any person is under a Lest ader or is allowed by the Fath or Mast. to contract for himself (the Lest), the Fath. or Mast. is to answ by the Contr. & tho it is not.

Mas & Lert Genl Rule 2. And the Lt provides that
all Contr. made by those persons without such au
shall be utterly void in Law. St Con 4 & 5.
You perceive then that the Contr. made by this Lert
for himself & in his own name — (under the au.
of his Master) are deemed the Contr of the Master. &
the Lt relates to all Lert generally according to its
expression. Of them the Father suffers his Child to
contract. & there are many cases in the State when
the Father allows the Child to take his "freedom" as
as it is called, & transact business in Merchandize
e.g. the Father is responsible for the fulfillment
of all his contracts. Now this I think in my opinion
so far as it relates to Lert extends no farther than
to Apprentices, Menials under age & Slaves. — or in
other words to such only as are under the Mast
domestic government. & are incapable of binding
themselves. For this Lt. is — Genl it is more equitable
that it shd apply to Day-Labourers & Lerts of
the fifth Class. The rule I take it cannot ap
ply either to Domestics of full age — for all our
Domestics of full age do contract for themselves
— The Lt shd be taken with these restrictions.
The Master
as such is not liable for the expence incurred by
the actions of the Lert — tho formerly it was
holden otherwise — This rule is not applicable
to Slaves. but to Menials Lert & to apprentices
but as to Apprentices there is usually an article
inserted in the indenture which renders the

Mas & Ser. Gen' rule & mast liable for this & pence 2 Esp 589. 3 B & P 247. contra for the old Law see Burr. 2666 Cas. 497. 1 Esp R 270.

Servants liability for injuries done to his Master or to Strangers

I have observed supra. that for those acts of the Ser't not done by y Mast's command express or implied, the Mast was not liable. I add. that for these acts the Ser't alone is liable, for as to them, he does not act as Ser't 1 Bl 431. Shinn 2 h & 3 Ba 564. And this rule applies generaly to all cases where the act of the Ser't was not done in the discharge of any busines or duty with wh the Mast had entrusted him. Thus if he commits a tres. Batt'y or drives the carriage wilfuly o' the carriage & person of another, the Ser't only is liable & not the Mast. Esp 2603. Cow 406. Sal 18. Ord & 175.

There are other cases however in wh the Stranger injured may have his remedy agt either the Mast or the Ser't at his election, and the rule is, that if the Ser't in pursuit of his Mas. business &c. does an act thro negligence, contempt ignorance & want of skill injurious to a Stranger the Ser't as well as the Mast is liable, provided y business in wh the Ser't was engaged was not provided on any contract express or implied, between the Mast & Stranger. Thus in the case of a Ser't driving the carriage thro negligence ag' the carriage or person of another, — the Ser't & Mas. both are liable

Mas & Ld. Ld liable &c for in this case the party injured has a right to consider the Ld as the only author of the injury, & is not obliged to enquire into his private relationship with his master. Sha 1053. 1 Mills 326. 8 Ray 220. 6 BR 125. 411. Esp D 560 586.

But it is otherwise & properly when the service in wh the Ld is employed is founded on a contr express or implied between the Mas. & party injured. Then the Ld is not liable but the Master is on the contr. The Ld is not liable for the act was for his Mas. in furtherance of his Mast business & in exec of his Mas contract. The case prohibited by the party inj is merely a breach of the contract of the Mas. Thus the dep putting of a Paper injures a coat given him to make the Mas alone is liable, for the contr broken. And in legal pinch of a man cannot violate a contract unless he be a party to it. The breach may be committed by a third person, & that person may be the cause of breach - but this leads to another question — & in the principal case the owner has nothing to do with the A/p. but with the Master he is a party to the contract that the work given him shall be put into safety & well done & on this contr the Mas. is liable see Lord 406. 10 L 431. Sal 603. Esp D. 586 as having on the point but not finding it.

There is however an exception to this rule in the case of a Ship Master, who is a Ld to his owners. If the freight is injured by his neglect or ignorance he is personally liable - altho the freighting is on a contr with

Mas & Lr. Ser. Cable & with his owners. It is however said in this case that the Mas. is liable because he is considered rather as an Officer than a Servt. but the force of this I donot see — there are other reasons viz. he may ably & in point of fact he generaly makes the contract himself & on this ground he is liable as well as on the ground of convenience and necessity, for when he is in foreign ports he makes all the contr & were he not liable there could be no certainty of the contract ever being fulfilled, his owners in foreign & distant countries & can not be got at when as the Capt is liable to be taken whenever in the course of his business he can appears in the Port in wh he made the contract Sal 444. Bort 58. 1 Vent. 190. 2 Ld. 1536. 5 Ray 220. 6 Mod 152 5 Ld Raym 125 arguendo

Whenever the Servt commits a wilful tort or a trangr he is liable in all cases, even tho the transactions on wh he is employed is grounded a tort between his Master & the Strangr. Thus if the Apprentice of a Smith shd cause a horse wilfully wh was given him to shoe he shd be liable, for this is not in pursuance of his acct, & is distinct from the business in which he was employed as if he had shd drive the nail into the horses head instead of his foot And if the Mas himself shd wilfully lame the horse, I take it he might as well be sued in this as in Ct Brethen — the only case I know of as laying upon this point is 1 Lord 106. see Reeves opinion contra R. D. Ca. 360.

Mus & Ser. Ser. liable &c. Solemnis that a pub. agent contracting as such, was not personally liable on his contr. On this prin it has been decided that indeb. act will not lie as an officer of the revenue for an overpayt made to him thro mistake, the remedy in such case is by an application to Government. for the sum is for the pub. & committed in the exercise of his official duties Cow 69.

But an act will lie as an officer of any kind for extortion, as done in the case of the P.M. here the illegal taking is for his own use & in such case he does not act for the pub. but cheats for himself. Cow 192.

It has been determined that when an attorney who has written a release executed by A to B afterwards brings an act. vs B, he is not liable to B for commencing the suit for he acts as bet to his client. 1 Rol 95. 1 Mod 209. 2 Ba 595. 3 Ba 563. I once thot this rule incorrect, but now I think it perfectly correct, for you will observe the attorney is not alleged to judge over his client's head & altho he knew there was a release, still the client may have been induced to give it in consequence of duress. or it may have been given for an illegal consideration &c &c. And even if the att'y knew of the facts still he might have been mistaken as to the operation of Law upon them.

But when the att'y is guilty of fraud in his own practice, he is liable, as when having suffered a nonsuit in the absence of the opposite party he

Mas & Ser. Ser liable & enters up judgt for himself — for this cant be excused by any plea of ignorance
But. 125. Esp 2 676.

The rules thus far laid relate to y Ser liability to the stranger he has injured, but also

The Servants

liability is liable to his Master for all willful torts or neglect of duty by wh the Mast is injured, as if he refuses his Mas home to dress for want of food. he is liable in damages to his Mas. These rules however are laid down with regard to Ser who are capable of binding themselves & without distinction relation to the privileges of Minors. for this distinction comes under property under the title of parent & child
(1 Woodc 466. 3 Ba 564.) The Clerk carried the goods of his fellow under the same laws before the duties were paid utterly they were subjected to a forfeiture, & he was held liable to his Mas for the Cy.
Bac J 465. 10 Mod 109. 3 Ba 564.

But no act will lie at the Ser for a bare breach of his Mas orders if no damage was sustained. for if under the Mast ordering his Ser to be mannerly & he shd disobey, no cause lie for the power of correction is considered as ample a remedy for ill-manners & abusive language
1 Str 92. 3 Ba 564.

But if the Ser disobeys or refuses to obey a lawful command of his Mas & in consequence of wh injury arises to the Mas or an act lies as

y Ser

Mas & Lex. Ser liable to the Ser. & the Lord that Mas
Mas' business remains undone when it ought to be
done is always sufft damage. 1 Lev 295. 1 Ser 174. 2 Kell
85. Moore 415

There is the same reason when there is a
neglect, but the part of the Ser, this no express com-
mand was given Ld Gr. if an Att^y neglects his Clients
cause in consequence of wh judgt goes agt him & the
Client suffers damage, he becomes liable, for it is not
supposed the Client knows how to command him, in
what manner to conduct the cause 2 Wils 325. 4 Burr
2060. Esp Dig. 87.

A Ser gen^l undertakes only for diligence
& fidelity & not for strength & skill & the Law does not
in gen^l imply any other undertaking. he is therefore in
gen^l liable only for topics which arise from the want
of these two qualities 3 Ba & 64. 10 Mod 109.
But this rule cant apply to any case in wh the Ser
has engaged to do his Mas' business professionally, for
here the Law will undertake by implication of Law
to use all necessary skill. Thus if the Atty engage
to take care of the Goods & injure one of them from
want of skill he will be liable. But this distinc-
tion does not perhaps fall under this title, rather
in Att. Bailee

Under the gen^l Rule then a Ser is not liable
for top to his Mas. occasion'd by robbery, for ordinary
dilegence & fidel^y will not guard ag^t open violence
tho it may ag^t clandestine, misconduct 1 Ld 64. 20
3 Bac 564.

Mas & Ser. Ser. Liable &c. and it is a Gen. Rule that the Ser. is not liable for losses by accident &c. such ordinary dilig. & fidelity is not a sufft guard, Whether ordy dilig. & fidelity has been used is a quest. to be determined from the circumstances of the case 10 Mod 109. 3 Bac 64.

But when the Mas has been subjected to damages for an injury to a Stranger occasioned by the neglect or misconduct of the Ser. the Ser. is bound to indemnify him. It may be recovered by Mas in an act on the case. Case. lies vs the Servant for beating another. 2 Lev 172 S. 10 Mod 109.

Tho' he never suffer the Mas. not to have been actually a party to the wrong committed by the Ser. if so he has no claim on the Ser. Thus if he had commanded the Ser. to commit a trespass &c. for wch he was subjected on trial, he can recover back from the Ser. neither the whole or any part. for the Policy of the Law allows of no contributions among joint wrong doers. 2 Str 826.

The Masters authority over his Ser.

It is given as a gen. Rule that the Mas. has a right to chastise his Ser. for a fault or neglect of duty, as for disobedience, neglect, impudence &c. 1 Bac Ab 1 Lev 175. 177. 1 Vent 71. Cro C 179. 1 Hawk 111. 130. 1 Rub 623.

But the correction or chastisement must be reasonable or the Mas will not be justified. 12 Mod 167. & ib 126.

Mas & Ser. Mas' case 2/3 And the gen' rule does not apply to the Lect & all the diff. claps, the 5th clap in gen' are not liable to this correction, &c— Factors Attorneys &c if it did it would be a mere disp. on. I suppose this rule applies to no other Lect upon who belong as near to the Mas's family.— the rule is substantially the same, or founded on the same principle, as that gives the Father the right to correct his child. And it is neither more nor less than one of the prerogatives of Domestic government & I see it can't apply to all who fall under the Mas's care. Clerks &c of the 5th clap in a more degree fall within this rule

The Mas then undoubtedly a right to chastise his Slave & Apprentice for a reasonable cause, & in some cases his Menial Lect. Thus he may chastise his Slaves or Appren. of any age, but not other Lect of full age, for it is said that if y Mas. beats other Lect than Slaves or Appr. it is good cause of departure, & may be discharged by the Justices &c. 1 Bl. 428 Patch 168. So also of the Mas. Wife Child &c Lect

It is laid down in the books, that the Mas. under the right to correct his Lect cannot justify the wounding of y Lect— the meaning of which is y the law will not justify it under the cause of Mas. for the rule is to correct with moderation. So if y Lect wound his Mas. for a fault. Lect wounding, the Mas cannot justify the wounding. Tho he can the assault & batt under his right of correction, but the

Mas & Ser. Mas. Anc. & wounding, he must shew such a justification, as will justify a stranger for the same act. 2 Mod 167. vid 120. 2 Lev. 330.

When a Mas is sued by a Ser for assl & batt, the Mas must state in his justification, his retainer &c. He cant on wh the service is founded the place when, the Ser was retained & employed & the business in wh he was employed — for these are all issuable facts. 1 Sid 177. 3 Ba 566.

The right of correction in the Mas is personal & cannot be delegated to another — He cannot give to a third person the right of judging of the Ser's culpability, & of punishing him according to that judgt, for the Cont of service by y Ser is fiduciary in the Mas. 9 Co 76 a. 2 Ray 62. 310. Stra 953. Cro J 360. 2 Mod 167.

The enquiry may arise here, by what signs does the Mas — in order correct the Ser of another? The case of the Mas it is said cannot be delegated. — In this case when the Ser is sent to school, the Sch. Mas has a right to correct him for misbehaviour &c. the right ~~arises~~ is one vested in him by the Laws & he does it for misconduct towards himself, & the same right to punish him for misconduct towards his Mas. & the Sch. Mas. acts not by any case delegated to him by the Mas. Tho' the case may seem at first sight to be a delegated case from y Mas. it in fact is not so

Mas & Ser. Mas' dies; D. gen. L. Lord for. the Mas. is liable for killing his Ser, when administering the "rod of correction" does not properly come here, but I observe only he may be guilty of Excusable Homicide. Man-Slaughter or Murder according to the circumstances of the case, see title Homicide 1 Hale P.C. 454. 473-4. 1 Hawk 111, Foster C.L. 262. Keyl. 65. 5 Mod 285.

Remedies of the Mast. agt Strangers for Injuries done his Servants.

In the first place an act lies in favour of the Mas. agt any one who entices away his Ser; the act is laid, with a per quod servitium amisit. & this per quod is a dis principle Cord 56. 1 Lev 462. 3 Mod 182. Sal 330. 2 Raj 1116.

As to the form of the act it is laid down alone under the head "Appren". I conceive there is no doubt but it will lie there, notwithstanding the case in Cord.

If a Ser owes his Mas. without being enticed away, & without just cause & is employed by another who knows of the former retainer, an act will lie agt this 3d person in favor of the Mas. But in this case the act must be laid with a "scienter" — for it is of the gist of the act agt the employer, knowledge of the former retainer, & without this knowledge the Law will not subject him 2 Ld 63. Roy 10. 106. 3 Ba 917.

But an Indict will not lie at C.L. for the enticing away the Ser, for there is only

Mas & Ser. Mas. rem[d] ⁊ a private injury & is not regarded as a pub. offence Sal 560. 3 Sal 191. 2 Ray 1116. 3 Ba 567.

But by a late Ld of Con. the entering a way ⁊ the ad[pm]. of another whether found or not by Ind[t] is made penal. & the penalty is not here given for a satisfaction, for the entrer is subject to a penalty not exceeding £100. & also to damages suffered by the Mas. Ld Con. Ba. ⁊ 115.

A Ser

is beaten by a stranger he may bring an act[n] of aff[t] & cat[s] like any other person. & if the beating occasioned a loss of service to ⁊ Mas. the Mas may sustain an act[n] per quod servitium amisit. In this case a recovery by one does not bar an act[n] brot by the other. for the injuries & rights of the Mas & Ser. are altogether distinct, for with the one ⁊ Ser it is corporal, with the other a pecuniary - from the loss of service 9 Co 113. 10 Co 131. 2 Bulst 194. 1 Lid 175.

The act[n] in this case is laid with the per quod as in the case of entring away the Ser. because the right of ⁊ Mas is founded on the consequential damages 2 no ⁊ 515 1 Ld 429 9 Co 113. 2 Roll 552 the Ser[t] in itself is no cause of act[n] to ⁊ Mas.

A Mans minor children are all his Sers within this rule i.e. those of his minor children residing with him, but are the adult residing in his family as subordinate members of it & subject to his cont. This also is the nominal

Mas & Ser. Mas "Serv" } a nominal ground of the
act per quod, for the seduction of a daughter, but
the ground is nominal only

If one servant beats a Ser
so that he dies, the Mas at C L. has no remedy.
for the private injury is merged in the Pub. offence
And it is a gen Rule of y C L. that no man can
recover for a private injury involved in a felony
Yelv 99. 90. 2 Rol 566. Ray 339. 3 Bl 566.

It has been determined that if a Surgeon who was employed to
cure a Ser of a wound intentionally injures him
so that a loss of service is occasioned, the Mas
has an act per quod ag him, but I dont find that
an act is given him until the injury was intentional, but I can see no reason why he sho not
have the act per an injury arising negligence &c.
the Ser may recover in both cases for the tort.
1 Rol 95. 2 Bulst 332. 3 Bl 566. 2 Ray 214. 1 Wils
339. Esp D 501

When a Ser who has been enticed away
or has left his Mas service without sufficient cause is
sued by the Mas. & a recovery for full satisfaction
had. this recovery will be a bar to an act ag the
person who enticed him away. otherwise the Mas
might obtain a two fold satisfaction. 3 Burr
1345. 1 Bl R 384.

Defence of each other. or What
acts can the Mas & Ser. justify as being in defence
of each other?

Mas & Ser. Mas Def. E

A Mas may maintain i.e. alet, apeal, the Let in any cur or law-suit ag.t another, without incurring the guilt of maintenance — nr guilt arises from maintaining a Stranger in a Cad-suit. 1 Bl 429. 2 Rol 115.

And the books are all agreed that the Let may justify an apault in defence of Master. i.e. he may do any act for his master we he might do for himself in his own defence, for it is said to be a part of his duty. 3 Ba 566. 1 Bl 429. 2 Ro 546 Lal 407.

But the Let cant justify an apault in def.e of his Masters Son or any member of the family, for to them he is not Let. of the right arises out of the relationship to his Mast. But with reference to the defence of the Son it will be mentioned that he can justify as Let. for any person may under certain circumstances justify an apt in defence of another. 3 Ba 566.

It is said ag.t a Let cant justify a violence committed in defence of his Masters goods — But this we could never understand, for it seems strange he must be allowed to defend by violence the goods in his Masters house, or suppose the Master absent & he is left in possess.n of the goods here certainly he ought to justify a defence by violence — the Rule is too gen.l & unqualified. 3 Ba 566.

Mas & Ser. Defence &c. Whether on the other
hand the Mas. can justify a excellence in defence
of his Ser has been an unsettled question, Ac-
cording to some opinions he can not. because it is
said he has an act for his remedy, to obtain, Ac-
cording to other opinions he can, & this I think the
most reasonable, for it seems very unreasonable
that the Master shd be compelled to stand by &
see his Ser beaten without lending him assis-
tance & as a this ground of his having his rem-
edy by act. no man wd be justified in commit-
a violence in defence of himself unless his life
was endangered. & the aggression may be un-
dispensible, but in other cases is a just cause
of resistance &c. 3 Ba 566. 2 Ray 62. Lal 464. 1 Bl
429. Lawes 124-125.

It is a rule of law that an indi-
vidual may void a Deed obtained from him by
Duress. but a Ser can void a Deed obtained
from him by the Duress of his Mas. he & they
imprison his Mas. I will not liberate him un-
till the Ser give a Deed. that Deed is not void. 1 Rol
687. 3 Ba 566. For the relation which between the Mas
is not such as to intimate to void such a Deed, but I
think a ct of Equity wd set it aside, for it is obtained
in violation of good conscience, I dont know of
ct ever has done this, still I think it might
the a ct of Law could not.

Finis

Baron and Feme

Marriage by the C.L as well as our own is considered as a contract purely civil & regulated by the Municipal Law of every country. And join the Divine law & Municipal law has honored so much as to consider the Husband & Wife for certain purposes as but one person; this is at least so in all protestant countries 1 Bl 442. 433.

By Municipal law the parties respectively acquire certain rights in the prop. of each other. The husband has an absolute right to the wifes prop. in possession in consideration of his duty to maintain & protect his wife, hence her estate is so far as he chooses made his to discharge those duties. This right differs as it regards different species of prop. The first species is that of the

The Wifes per. chattels in poss.

The Bill

or this species of prop. is, that it vests in the absolutely by the marriage. Hence he may dispose of it at pleasure & even bequeath it; with the exception of a horse & saddle, which are prop. exempted by Parliamentaria, (see Bract. 2 Bl 435. 1 Bac Abr. 1 Ed 391

By per. prop. in poss. is meant personal prop. as contra distinguished from such as

as is in act". A vesting merely in a legal claim or property, passes it to husband in Poss". But Bonds, Notes, Bills &c belonging to the prop". a chose in act". so of the Bonds, Notes &c are in Poss". but these are but evidence of the prop" & not the thing in prop". itself.

If the Husband dies intest". before the Wife these things in poss". go to his Rep". &c. not vested in the Wife. 1 Ab. 348.

But as to the prop". wh the Wife held in the right of marriage & Rep". a trustee or add". the Husband has no beneficial interest in it. 1 Ab. 348.

He is entitled to all the pers". chat". acquired by the Wife during cov". Thus if a leg". is given her during y coverture it belongs to y Husband. it is with a gift & the acquisitions gained by the Wifes labour. Sal 114-5. 1 Da 290. 292. Ca Ch 214.

Wifes Choses in Action

The Wifes choses in act". the rule is, that the Husband may dispose of them at pleasure during their joint lives. If during the Coverture he must reduce them to Poss". or do some act equivalent to that or the right to them will survive to the Wife, thus, the Wife at the time of mar". owns a Bond, if

Wife Children &c. Jones v. Mr. Thus devise without creating such right of ownership over it, it survives to the Wife & does not go to his Repr. as it would had he died intestate act of Jones 4th. 1 Swan 351. 1 Sha 611. 8 Mod 55.

And if under these circumstances the Wife shd die first, by the Ed. the choses in remain to her Repr. but by 22 & 23 Car. 2d. it now goes to y Hus. i.e. by the Law without the act of ownership he loses all title & it as Hus. 1 Bl 516. 2 Bac 442 &. 1 Bac 89. Chit. P. 21. 2 Bl 435. Com. D. Bar. & Fem. E 3.

But now by 21 Geo 3rd & 22 & 23 Car 2d. the Hus as adm. of his Wife take this first on her death for by y first of these Sts adm. is to be next friend of y deceased, who the Hus. & by the 2d. he is not obliged to act with the Wife Repr. in distribute her effects 2 Bl 436. 1 Chit. P. 21. 1 Rol Ab. 1 Bac 477

Under our Law however the Hus. has no such right, for in all cases adm. goes to "next of kin". & no part. provis. is made for y interest of a Wife, & there is none by the Ed. & no benefit is given by 22 & 23 Car 2d in favour of the Hus as adm. St. Ga. 165.

But the Hus cannot maintain Admin. of y Eng. Law, must by Com. Law be willed to bequeath the Wife's goods in act. — & the reason is that y Will does

[illegible] so the things are not reduced into [illegible] of event. 1 Inst 351. 1 Ba 265

But by ye Eng. L the Husb. is obliged to pay his debts out of her chos. altho he is not obliged to act with her Repns. as to surplus. — So that it seems he may hold agt. ye Repns. of ye Wife but not agt. her Creds. But his personal liability to pay his debts ceases by [illegible] event. casts only during event. but it hath effect of him to pay all and after ev. determinated 1 Inst 351.

And it has been decided in Eng that if Husb refused to act as Admr. & the Admx. was granted to another, still as next of kin he was entitled to ye surplus of his Wife est after pay. of ye debts. — This is good and. the Laws have been made by men & not by women — & is stretching the rule a great ways & I think the construction very questionable. 2 Atk 526. 1 Wils 166. 1 P Wms 381. And this right of ye Husb as next of kin is transmitted to his Repns. so that they will exclude the Repns of ye Wife &c. &c. How both these rules can stand together ye rule above that the choses in act. &c. of ye Wife vest not reduced to poss. &c. & ye Husb Repns. — & that rule is well supported by case.

But that the Husb does not by a mar.

Wife chos" in Act" & marr" upon Settlt" upon her, & said it was a purchase of them as of the rest they are to be Settlt" 2 Ch Ca 312. 412. 2 Vern 301. Bol. Ca 165.

But if there are two rule it seems not to hold unless there is an express or implied agreemt" to y" effect as of y" settlor in consid" of her fortune" — & this to support by y" latter case.

And so now

It is not that the settlt" is not necessary to a purchase but only so, when so much is to allow the inference that this was intended to be in effect. Amb 392. 3 Pr Wms 199 Rn. 2 Ch Ca 209. 1 Vern 40. 2 Vern 64.

But if y" husband makes a Settlt" after marr" it is not regarded as a purchase of her choses, unless in y" opinion of the Chancellor the purchase is an adequate one — as y" Court depends upon y" discretion of y" Chancellor 2 Atk 448. Pro. C. C. 2 Vern

2 Vernon of the

the wife when she becomes absolutely entitled by y" marr" — but there are cases in Eq" wch. — then it must be an exception to y" gen" Rule — it is so, but y" is not a Rule of y" C.L. but it is one founded on the construction of y" Statute of Uses & is a mere question of Eq" & Eq"

noying of Ld Arlle 1 Chit R. 21. 2 Ba 17. 2 Ba 434. 435.

The debts of y husb. owed by y Dec & wife jointly & severally are joint-tenants of y judgt — & belong to either of them & their executors — but to be joinctly, for y judgt has destroyd y one & claim & substituted a new one, — before it was a debt due y Wife — now it is a debt due y Dec & wife 1 Ba 93. 1 Vern 396. — 2 Ld 337. 1 Mod 179. 3 Mod 169. & if either of them die before judgt & satisfied the whole by the survivor: & y Ld Chy. gives it to y survivor 3 Mod 179 m. 1 Chit R. 21.

In Com. the jus accrescendi is not yet unknown, & among joint tenants the right of y dec is transferred to his Repr. And with a case of a judgt being given by Dec & Wife or Executors, in wh. of the Wife did survive the Dec being dead before collec. the said Debt but one of the other to the said Dec & Exec. Repr.

Debt left in Eng & y. country of y Wife dies & y Dec survives the entire right of collec. remains in y Dec but the same not to the Wife Repr. — & so it is with perfect Strangers. And in these cases y Dec may sue out an Exr. or a sci. fa. or bring debt on judgt. for y entire right of collec. being in him.

Wife Choses in Act" } Same Law may do
what any other union in the case
cd Do / Ba 293. Cas C 205. / Chit Pr. Vol 1.
2 Bay 1050. Part 415.

The Bills may Dur. of cred" & all
upon the Wife choses in act" for a val"
consid" but a Sp" without a val"
consid" is not good nay y Wife & y reason
is that an Sp" of a chose cons an equit-
able claim only & want of legal interest
title, & therefore lieng equitable alone
an appeal to Ch must be made to have
it settled - & of the Sp" is without consid"
& being inequitable Ch will not enforce
it. 3 Sch R 94. 2 Atk 20 3. 426. 17. / Eonl 305. 3 Pr
199. 1 Bro. Ch. 44. Rob. F.C. 295.
It has however been decided y such Sp"
without consid" would as by Sp" is
such an act y raw exacts as changes
y Sp" & acts it in the Bills - But
y has since been determined not to be
Law - for y it was Law y former rule
would be y one y Ld. 1 Pr W 330. Not & Devens y
Wife) - but contrary / Atk 20 3. 1 Bro Ch 44. Rob
F.C. 295.

The Bills may however Release y
Wife Choses in Act without consid" 2 Atk
20 3. 1 Eonl 305.
This on y first
impression appears to be an anomaly &
distinction, but it is natural, for y Rules

rules are founded on diffnt prins.: as to yt
clear it is enforced at Law & may there
& Eq will & will have it's full effect
as yt Husb has yt legal right to his Wifes
prop. & Ch cannot set aside, but on
the other hand, the Spirit must go into
Ch. & it being inequitable Ch will not
enforce it.

Whenever yt Husb is obliged to resort
to Equity to obtain his Wifes choses.
Ch will not give them to him unless he
will make a reasonable provision for
yt Wife. as in case of a Bond being in
ye hands of a trustee, & Husb applies to
Ch to have it delivered to him, Ch will
not give him equity unless he answers
yt quia equity agt him 1 Ba & Pl 251-
382. 458. 2 Vez & Br 15. 515. 3 Bro Ch 325.

And if yt Husb assigns his Wife dies &
a sol: consid: the assn: is in Equity a trust
to all the equities the Husb was liable to. for
yt ct supposes he knows what yt equities are
& yt chuses on the very face of them appear to
belong to yt Wife 1 Ba & Pl 351. 382. 458. 4 Bro P.C.
2 Vez & Br 15. 506.

These choses of yt Wife are not liable
to, & taken for yt debts of yt Husb after his
death, the Wife surviving him — unless the
Husb has as above stated purchased them by
a Settlement 1 Prest 351. 1 Ba & Pl.

a little choice in that? & indeed they ought to be taken strictly according to the rule which ought to direct them, and be in direct contradiction to another rule viz the duty we owe them namely to do what we can to relieve them from their present distress by removing their joint debts. How can they be taken as joint debts during their joint lives for the same reason, they not being reduced to the power of the other, in respect of their debts as against the survivor to be taken as joint debts. The goods of both are in the power of either to dispose of, during their joint lives, the property of the husband is absolute, and that he may use the whole of it, not being converted they are in the same legal proportion, — they cannot be considered as chose in act: but by construction of law & decision of cases in point: Str 1172. 1 Vern 261. 1 Rich 241. 1 Ca. 249.

But if her goods have been taken & converted before marriage, or if an injury has been done to them for such a claim for damages & detainer, the action survives for the right to them which has been converted into a chose in act: & so of a debt, owned to both by the law & right of survivorship 3 P.R. 231.

But it has been asked, when the goods have been found before marriage have not converted into a chose in act: whether the law

may, must or can sue jointly with
wife. 2 Ld 192. 3 BR 331. 1 Vent 351. 1 Lev 197.
& one of them dies it survives to
survivor in wife's affairs - but
this must be inquired

If a cont is made to pay
money to wife but obligee is bound to the
Bus. alone, he is subject to the Bus alone
but yet if he may receive money either
one of a pay to her will be good. - But
if they cannot release & reason is. the
Returns of ye writ. tho' they give her right
& receive the money, they do not in her
rights to release 3 East 331.

Bus. right to Wifes Chattels Real.

Chattels

Real, are such pers. pro. as savour of the
realty - that is pers. pro. annexed to or issu
out of real estate, as, a Farm for yrs. or
Mortgage. - It is a chattel because
is pers. pro, but it is not a realty for it
not a freehold. 2 BL 386.

The Bus. has over this pers. pro. when it is in-
vested in his wife a more extensive right
than he has over her choses in act., as this
chattel real may be taken in Ex. for Bus
debts - during coverture, but her choses in
act. are not to be sold 1 Roll Abr 346. 3 Ch
344. 4 Ch 33 - 9.

Wife Chat. Real } ext. of Hus his right
to dispose of them absolutely during covt. &
of her survivorship. cred. — for a conve-
ance to him after of legal title. But
if he dies not dispose of them during cov.
they survive to of survivor, as that Joint
their joint lives they are considered a
quasi joint tent. of of chattel real Pr Ch 415.
2 Bl 434. 1 Inst 351. Litt 516.
It has been resolved in Com. that if the
Wife dies first this chattel real shall
so entirely to her Rep. the jus accresc.
nothing known in of state. — but
of is a departure from of C. L. 2 Vin 233.
3 Inst at L.
neither the Hus. or Wife can devise the
chattel real for of right of survivor is
prior & paramount to of of any devise
— indeed at C.L. of Wife cd not devise
under any circumstances Pr Ch 418
2 Vern 270. 2 Bl 434. 1 Inst 351a.
The Hus may by
a Deed poll duly exd. & enrolled convey his Wife's
chattel real as to vest it in Jos. not litt
after of coverture, for the right of survivor
wh of Jos. takes immediately that of cov.
is not to take Jos. litt after of covert.
terminated — it comes within of disposi-
tion made dur. covert. But Hus cannot
not dispose of them by Will tho he may

may by deed as alone Ca. C 2 87. 1 Rol 334.

But Husb. & Wife chat. real are not subject to Hus debts after his death of she survives him — for her right intervene & is prior to that of any Cred.s & as y.d Hus cannot subject them by Will no Cred.s can 1 Rol 349. Litt sec 286. 1 Inst 254 b. 3 Ba 209. 210.

Hus by y.d Ld. or they Talle for Her debts when the dec.d first & y.d Hus right intervene & excludes Her Cred.s, as in the former case she excludes His Cred.s in case.

But in Com.n Law must be def.t. & as they were go to her Rep.s they must be Talle for Her debt. (Cents. & Chittenden)

If a Fem.e sole wh is p.r tent.s of a chat.s real marr.s & dies the whole interest goes to Her Hus p.r tes.t & none of it to the Hus. for his title is Postponed to y.e title of the former not being enchoate until y.e Marr.s. But y.e Hus of same former to never the p.r tent.s during y.e Wife life as the Wife herself had — by an actual disposition of the Wife personally — & thus destroy y.e pro. accrue.s in case.

During y.e Wife life y.e Hus may assign Her chat. real even in equity — for the y.e legal title in him but as to a value in acc.t he has not y.e title — & hence if def.t as to the L. nor

Wife's Chat. Real ; over them in the same Lest — The Ch of Equity follows ye Donor contrary to Law. 1 Vern 414. 2 id 270. 3 Pr Wms 22. Rob. 2 Ch. 479. 2 Ves 201

Husband's right to Wife's Real Estate

The Husband of a Wife

Real est. of the Husband has during her life (or of coverture) the sole Benefit or right to use & occupy it, but he cannot by his sole act alien the real est. of his Wife for that is contemplation of Law is out of reach of him to discharge his duties as Husband. 10 Co 42. 1 Sid 11. 1 Ba & Ad 305.

Nor can the Husband & Wife alien her Inheritance except by fine or Com. Recovery. No other act of the Wife being deemed solemn enough & therefore only she is allowed to alien by Fine &c is that the Husband & Wife join Lessee &c in 1 Rol Abr 841. 2 Lev 66 9. 670. 1 Ba 301.

In Com by conveyance of a Husband & Wife's Estate the Wife may be conveyed by a joint deed of Husband & Wife, this is sanctioned by custom & from time immemorial. See more upon this subject Ch. Com 244-6.

If the Husband during the coverture grants out of his Wife's est. an estate longer

longer than one for his own life & tenant
& does not like otherwise to forfeit his
est. — for there is no one to claim the
forfeiture as the wife is disabled by
coverture — the Court lately the only
occasion for the rule & the reason ceased. Lessee
115. 594. 1 Saund 326. 9 Co. 140. 2 Bl. 274.
Such a grant however would amount or op-
erate to a grant only for the life of the
Grantee & possibly for a much
shorter time — as it may be the case
if he is not entitled by the custom, a
widow to grant a fee out of her estate
est, it will terminate on the death of
the Wife or his own as the case may be
1 Ba 301. 1 Saund 326.

On the death of the wife
surviving, her real est. vests solely
in Lord — & on his death it goes out
in her heirs, that if the Husband
survives the wife & has had a child,
born alive, of her, he is entitled to a life
est. as tenant by the curtesy, & if of the whole
est. of such the wife died seized during
52. 1 Saund 30. 2 Bl 126.

If a Dem. sole, having
mortgaged her est in fee mort. & dies ha-
ving her Husband, he is entitled to an est. by cur-
tesy in the Equity of Redemption provided he
wd have been entitled by the custom to an

Wife's Real Est. } an est. in her Lands.
but still it must be seen, how
y husb. has no right of Dower in her
Eq.te of Redemp.n 1 Atk 603. Dow. & M. 112. 115

By y custom of Gavelkind the
is entitled by y. curt.e if he has had no
child by the Wife. and by y. custom
of Bor. the Lands in Bor this State are held
by this tenure. And the Husb has not
been allowed here to take by the Curt.e under
the circumstances 1 Ves. 130. 2 Bl. 126
Ld Lon 2. 132.

But there can be no tent.e by y curt.e of
a Rem.r or Rever.n of the Wife — tho' it
is in fee, for the Wife dower & cannot
be aided. Actual seisin of y Wife
is absolutely necess.y to entitle y. Husb.
by y. Curt.e 2 Bl. 127. 1 Inst. 127.

He may however have an est. by y curt.e
in an Incorpo.l Hereditt. altho' he does
not aided, for seisin here is absolutely im-
possible, — as y. right of Way or an am.y
but where actual seisin can be had
of y subject matter there nothing is entitle
y Husb by y Curt.e 2 Bl. 130. 1 Inst. 29.

It has been denied in Eng. that actual
seisin of y Wife is not necess.y but a
mere right of Prop.y attaching is
enough 1 Day 295 & 6 vc. Adthouse v Hall
Ct. Dec. 33.

The Marr. must have been legal to entitle y husb. by y Curt. to administer de facto only is not sufft. The Marr. must have been legal, & if so by the Ch. of the Est. 3 & 26 Hen. 8. 13. 2 Bl. 434. 1 Salk. 119. 1 Brad. 30.

By y birth of a living child, the Father becomes tenant by y Curt. initiate or in. choate but no consummate title of Dower of the wife, that during her life he has a right & title as to y usufruct but this is not by the Curt. but as Dow. 2 Bl. 126. 1 Brad. 30.

Rent accruing out of y. wife real est during the Curt. by the B.L. goes to y husband, — this is in the nature of a chattle interest & so sold as it does 1 Brad. 351 a. 4 Co. 51. 1 Rol. 350. Amb. 694. 2 Ves. 14.

By y C.L. y wife can hold no prop. to her sole & seperate use — no prop. over wh. y Husb has not control & that on account of y legal identity of Husb & wife. But now a grant to the wife sole & seperate use is effectual by Eq. & y Husb has no control over it & no rights & inheritance either by y Curt. or Tenancy 1 Powell 94. 95. 1 Atk. 270. 1 Bro. C. 103. 444. 2 Ves. 191. 565. 2 Burr. 929. 315. 1 Ch. 126.

Wife's Rights & Liab.

[illegible] the Husband
effect of a grant of the use
use of the Wife might recover of the
Husband as it could the Wife have by virtue
of the marriage &c.

But on the other hand the Wife may exercise
in Eq. as absolute a control over the
the property, with the exception that she cannot devise it. by 29 H. 8. Ken. 4. Chelsea
by 34 & 35 Hen. 8. but this power is confined
by means of the Statute of Uses & Trusts
to that estate nominee she could devise
2 R. 575. 1 Rand. 444. 1 Call. 27. 91. 92. 102-3.
1 Atk 270. 3 Atk 393. 595. 2 Ves 191. 563.

She has by virtue of his power
over the Wife real est. cannot by his disposi-
tion a gift made to the Wife between
separation — for he can no more control the
matters of the est. than he can of the est. they
after it is created — But as to comm. Property
he can by his disposition dispose them
1 Burr 396. 1 Ba 303.

Nor can he by his disposition affect
real est. coming to the Wife by descent — for
a law by operation of Law. 1 Burr 396
& Ble 292-3. Com D. Bar. & Fem. P 2.

But the Wife herself may after the termination
of the coverture, annul voluntarily at pleasure
any contract made during coverture even if it
was made with the assent of Hus. 1 Rol 349

1 Vol 349. Doug 435. Com. D. Bar. & Sm. Ch
1 Sust 8. 356

after y^e W^fe was allowed to hold
prop^y to her sole & sep^e use it was still supposed
she did not hold it in her own name, but a
trustee must be interposed — but now y^e
trustee is not necess^y. 1 Ponll 94. 95. 1 Ves 126
1 Atk 270. 3 P. Wms 334. 1 Vern 246.
And such prop^y may be given to the husb^d
her before or after marr^e & by her thus
made over by a stranger. When y^e husb^d
the gift he is considered as trustee for her &
she may enforce y^e trust ag^t him 1 P. Wms
126. 3 Atk 399. 2 P. Wms 79. 316. 1 Bro. C. C. 444. 2 Vez 565.
3 Ves 678. 5 id 434.

What however has been determined y^t if a feme
cov. possess^d of a trust term for years to her sole
& sep^e use, marries — it vests in y^e Husb — but
by late decisions this has been contradicted — & I think rightfully, for it cannot
see how a feme cd hold Vern 246. 2 id
270. 2 Atk 421. 2 Bro CC 345 ag^t y^e rule. 1 Sust 56
n 1. 112.

Voluntary Conveyances by ceremonies
by a feme. have in some cases been adjudged fraudulent as to y^e ag^t y^e Husb, the
afterwards marr^d. as when without y^e
knowledge of her intended Husb. she made
a vol^y conv^ce to a Stranger 1 Ponll 259. 2 Vern 47
2 P. Wms 595. 2 Ves 267. 2 Bro CC 345.

1

Wife's Real Est. § Rt of a Widow

hard. Child'n makes a voluntary conv.ce of hers. to them before a 2d marr.e & without knowledge of her intended Mrs. he cannot set aside. & it is perfectly reasonable it shd be so. for if child'n who have got in possession before 2d Mrs. 1 Powell 259. 2 Vern 402. 2 P Wms. 1 Eq Ca Ab 165. Cowp 705. Rob. Ec. 351. to 359.

The Wife's claims to Hus. Property.

By 29 Eng Act of distributions 22 Car 2 c 3 it is enacted that if the Hus dies Intestate, the Wife shall have absolutely as hers. 1/3 of his per. prop.. & if he dies without issue she shall have 1/2 & the Kindred like Rts in the country — but in both the above cases of Death on the part of Husband 2 Bl 515. 2 Bac 427-8.

As to Hus.d mar.e est. of Wife by C.L. he is entitled to a life est of 1/3 of all of the inheritable est. of wh he was seised at any time during the coverture, which any issue she might have had could have inherited 2 Ed. c. 35. 2 Bl 126. 131.

And the Hus by the C.L. cannot by any alienation of his own for the right of the Wife so that he will his est. of Wife and still have his right of dower. — She may however be barred, but it must be by matter

matter of Record as by Fine & Recovery
but a Jt. Deed with her Husb will not bar
her. 2 Ba. 139. 140. . 10 Co 49. Plow 515.

In y States of N. Y. & Mass. y Wife hath
her right of Dower, by y'n. her Husb is
dissed — Thus by St.

But if any Issue she might
have had could not have inherited y land, she will
not be entitled to Dower in it. as in
case of an est given in Special Tail out
of Issue of his wife B. his sec. Wife could
not have Dower in y est. 2 Bl 131. Litt sec
57.

But y person claim. Dower must have
been y actual wife of y Man at his
death. — & a divorce a vin. mat. ℔ tam
ex. wife & her Dower &c. because she
was not his Wife at y time of his death.
7 Co 27. 5 Ed 98. 1 Rol 581

But a divorce a Mensa & thoro is not a
bar of Dower. for this is only a seperation
& not a dissolution of y matr connexion
1 Inst 32-3. 9 Co 19. Roy 105. 2 Ba 190.

By y Sta of Marl. if persons un-
der y age of consent, the Husb dies before
he attain y age y Wife is entitled to her
dower, for y marr is tho' voidable, yet not
being voided, is good 1 Inst 33a. 40a. — but
y female must be alive y age of nine
at y time of death — that she may be entitled

Wifes right to Hus Est. } betrothed at an earlier age

But on ye other hand old age does not bar the right of dower, & Law does not here regard imbecility 3 Bl 131. Litt sec 36. 1 Inst 33. 40. 1 Rol 675.

It was formerly ye case yt ye wife of an Idiot could be endowed - but now decided contrary - And it was always ye case that ye Hus of an Idiot cd not be tent. by ye curtesy - for to give a person a right to dower or by ye Curt. ye mar. must have been legal, & this cannot be ye case with ye mar. of an Idiot, she being incapable of giving consent to ye mar. 2 Bl 130. 1 Inst 31. 1 Lev 41. Bul. N. P. 136. Cap D. 125.

The Widows right of dower is paramount to ye claims of Devisees. Cred. & [illegible] [illegible] of ye Hus [illegible] [illegible] that of mortg. was made after ye marri. Lord 102. 2 Bl 492. 4 Co 64. 66. 10 Co 49

On ye other hand ye Wifes right [illegible] [illegible] Pro. Brsh. under ye L 22 Ch. 2d, is postponed to all these claims of Leg. [illegible] &c. The ground of her preference in case of dower, is that it has relation back to ye marri. of ye Hus was seisd at that time, & to ye commencement of this seisin if ye est was obtaind after ye marri. & so it follows that her claim is prior to all others.

cited as to the Question is, one of the
Testr. Question is if her claim to y[e] Dower first
does not arise till after Husr. death, &
so all the other claimants are prior to y[e]
y[e] Widow.

A seizin in Law merely, or a
constructive seizin as contradistinguished from an actual one, by y[e] Husr
is not sufficient to entitle y[e] Wife to Dower, even
with y[e] Husr right by y[e] Curtesy in which case
y[e] Wife must die actually seized. The reason of y[e] diffr. is obvious & is, that y[e] Wife
has no power to compell y[e] Husr to
take seizin, but y[e] Husr can compell
y[e] Wife to do [illegible], Co. Litt. 31. 2 Wils. 118.

In Comm. Law Wife is entitled to Dower
only that inheritable Estate of which y[e] Husr
died seized — This differs from y[e] C.L. and
indeed all Civil Law in relation to y[e] State
& Com. Law Dower. 1 Roscoe 60. —

The word of y[e] Statute which has Dower
in the inheritance of wh the Husr dies "seized".
but this word "possessed" has been
construed to mean "owned" — so an actual
Seizin by y[e] Husr is not absolutely necessary
as in the Civil Law

and it has been further determined in Com.
that the wife have Dower in Estates wh y[e]
Husr owned at his death but were actually
disseised, see Atkinson vs Atkinson.

Hus. real Est. Wife's Right &c

how form'd or appears the Hus may defeat & divest of Dower by alienation in his life time & thus by his own sole deed. — but he cannot do this by a deed in contemplat" of death or by any other testamentary instrument.

In Eng. of a Mort" in fee mar" his wife is not entitled to dower in Eq" of Redemp" — because it is said of in a mere Eq". Not a legal est. — But title of Hus is entitled by the curtesy to his Wifes Eq" of Redemp" — how & pain is here the same in both cases — Right of favour is shewn in either case it shd be to the Wife — The Mod" Chan" dont like the distinction but they say ye cases are too stubborn for them 2 Atk 525. 1 Ch. Ca. 305. 3 P.W. 229. Talbot 138. 1 Bl. R. 138. 161. 1 Bro Ch 326. One notable case has in Eng been decided contrary to this rule, it was by Ld Jones, Gilbert, he was told enough to beat any rule but no one dared to follow him & his decision has been overruled since it 2 P.W. 700

Eq" Woman has made a Mort" for 99 yrs. the Wife is entitled to dower in the reversion expectant on the determination of the Mort" — The Dow" is not in Eq" of Redemp" for that is but a chattel

Dower, & not the interest, but it is in the reversion Dow. 319.

In Com. on other hand it has been decided that if Wife was entitled to Dow in ye Hus Eq. of Redemp. on a Mort. & dyed & her right is paramount to that of Dow. 4 Ves. 627.

The Wife may forfeit her right of Dower by an elopement with an adulterer - by virtue of St Westr 2d. - and also by a divorce a vinculo matrimonii at C.L. 1 Inst 32. 2 Bl 130. 137. 1 Rol Ab 680. 3 Bac Ab 765.

Alienage was also matter of forfeiture of her right of Dower as an attainder in an Eng. woman, she cannot take her Dow until by ye interposition of ye Legis: and ye reason is that an Alien cannot hold Lands. 2 Bl 131-135.

The Reason of her loss is a loss of right of dower in ye Husb. by ye C.L. 2 Bl 130, 136. The reason of this is that in consequence of ye attainder the Husb could not inherit & so she cannot take Dower - for she takes only when her Husb inherits

If the Wife obtain the title deeds from ye Husb at law she has the right of dower suspended during the coverture. Often they in an ad hoc manner the Deeds that she has often Dispossessed by ye Husb

Dower &c. found agt her tho she is bound forever Bro. 99. 9 Co. 17. Perk. sec. 356. 360. 5 Co 75. 2 Bl 136.

A. by a Lease in Dower alien'd Lease in fee or for life of a stranger she forfeits her estate by 4 Edw. 6 c. 20 1st — Spec mo. need d thro' it, for she no forfeit by a plain rule of L.L. to wh. there is the only exception in favour of the Bro. who if he alien wt. it not he is entitled by Cust. he does not forfeit. — but if comm. person only a life est. at farthest. 2 Bl 136-7. 2 Ba 230. — as to rule of the L.L. see 2 Bl 274-5. Litt sec 445. 1 Inst 251

The Widow also bound if she has accepted of a Jointure before mar. of a Joint. as a substitute for Dower. — as to what a Joint. is see post — 2 Bl 137-8. 1 Bulst. 173. 2. Ba 148.

It also by joint. her Husband in a Fine or Con. of Fines of his inheritable Lands. — The Joint. Lease is that the Wife is estopped by the Rule to enter the Coverture at the time of levying the Fine &c 2 Ba 139. 140. 10 Co 49.

In Con. a divorce a vin. mat. does not take away right of Dower. unless the sentence of Court party — or in other words. if she obtains a divorce or affirm. agt her Husb. she is entitled to Dower but if Husb obtains it by affirm. agt her. she is not entitled 2 Bl Com 147. 349

Indeed Dower seems to imply that a woman living absent from her Husband without just cause & without his consent is barred of her

knight of dower — but I dont know that this has been decided. 1 Co Litt 349. 2 Saund 285.

Paraphernalia

The Wife is entitled to certain articles of per. prop. call'd her Paraphernalia. By this is meant something over & above her dower & consists of her Cloaths Bedding & Ornaments. — Sometime it is said to consist only of her Apparel & Ornaments.

There is a distinction between prop of this kind, & that the Wife holds to her sole & seperate use, which is difficult sometimes to be ascertained. as to these diff" kinds of prop,

In the first place I observe as to the effect of these two kinds of prop. That as to what the Wife holds to her sole & seperate use. the Husb. is an entire stranger — But as to some of the articles call'd Paraphernalia the Husb has a qualified controul

as to the prop. held seperately in the Wife or some one must be given for her sole & seperate use. — The intention to give it to her must be apparent Bedell 2 Ves 93.

But this is not the case with the Wife Paraph" for if the articles were given to her sole & seperate use they would no longer be Paraph" so that there is a distinction between these two kinds of prop. for the articles may be of the same kind, & given to her sole & seperate use they would be out of the controul of the Husband.

Paraphs. A gift of this sort of ornaments might perhaps not only from the terms of the gift or bequest, but also from the nature of the ornaments under wh it is given, as a gift of diamonds &c. to be held by the Testator, be held to be a gift to her sole & separate use. 2 Eq. Ca. Abr. 155. pl 8.

Paraphernalia ornaments given the wife by Testator during coverture have been considered as given to her sole & separate use in some cases, & not as paraphs. Here it is not always easy to distinguish between them, tho' the incidents are in some respects diff. — a rule of distinction can be given. 3 Atk 393.

If the Testator bequeath ornaments to his wife they are not to be considered as to her sole & separate use for she takes them as Leg. wh. is an argument that they are to go with his — as they are subject to his debts.

Rich. given by the Testator to the Wife during [coverture] life-time) to be worn by her as ornaments of her person are considered as the most exceptionable case to hold as Testator. 3 Atk. 393. — Sem, if given at the time of marriage.

The Paraph. is of two kinds 1st Cloaths & Bedding. 2d Ornaments & trinkets with which she has come as jewels, trinkets &c. 1 Rol 911. 2. Bl 435-6. Com. Dig. Bar. Ben. B 3

Leaving the 1st & 2d paraph. of the 2d kind to be discussed. The 1st kind is considered as necesss. but the latter is not so. but even this by the modern decisions the Wife could not claim them while the Husb. 2 Atk 77. 3 Atk 358. 2 Bl 436. 1 Atk 330. 2 Eq. Ca. Abr. 678. the reason of

acc. on y subject are not worth much regard

But y Widow Paraphl.a of y 1st kind cannot be bar'd by Ord.s nor can y Heir recover them, & there is indeed a case reported where Heir was indicted for selling these necessary Apparel of his Father 5 Ba 495. Perk. sec 501. 2 Roll 436.

What is necessary Apparel or bedding cannot always be left to the discretion of y Ch. to be determined upon y circumstances of y case somewhat wd be moderate with one person wd be extravagant in another, It has been holden as to bedd that y Widow is entitled to one bed at least Com. Dig. Bar & Dow. B 3. 1 Rol 911.

Paraphl.a of y 2d. sort on y other hand are liable on y death of y Heir for y payt. of his debts. but they are not liable till after y other Personal Assets is exhausted — The Widows title & right is prior & paramount to that of Devisees & Creds.s 2 Atk 104. 3 Ch. Ca 369. 395. 3 P Wms 331. —

And if the Heir by Fraud & Covin of the Widow take the Apparel &c of y 2d. sort Paraphl.a of y Husb. to y Value of their debts, it will be allowed by Ch. to come upon the Heir to the amount that y Fraud & Covin of y Widow & Heir had an est. of inheritance — So that it seems that her right even to y kind of Paraphl.a is to that of the Heir at Law to his inheritance 1 Vern 330. 2 Atk 77. 104. 3 Ch. Ca 369.

A Lett.r or Joint.r made before marr.e & expressd to be a bar to all claims upon y Husb est. is a bar to this 2d. sort of Paraphl.a

Paraph[t]. and a settl[t]. of Annuity made in pursuance of article agreed upon before mar[e]. & proved to be in Lieu of all claims upon Husb[d]. est. is also a Bar to the wid[s]. dow of paraphernalia. But such settl[t]. does not deprive her of y[e] first class. 2 Atk 642. 2 Vern 49. 93.

If y[e] Husb.

creates a trust est. in Lands for y[e] payt. of Debts she is entitled to a remuneration out of this trust est. if the paraph[a]. has been taken by Cred[rs]. therein by virtue of Decree — for y[e] Wife is a Cred[r]. in equity as y[e] heir — In y[e] case if there had been no trust est. created by decree Cred[rs]. could not have come upon y[e] Lands — so that where a trust est. is created by decree y[e] decree Cred[rs]. have y[e] same claim upon it as y[e] Heir[s]. Cred[rs] have upon y[e] realty. 2 Atk 155. 3 Ch 348. 490 Vern. 2. 49 & Vern. 53.

And in all these cases, the right of the Widow whose paraph[a]. has been taken for y[e] Payt. of Debts, is y[e] same as y[e] Devisees of y[e] Husb. Lands, as y[e] Heir at Law had there been no Will — her right is paramount to Devisees & Representatives 3 Atk 395. 1 Ves. 131.

If y[e] Husb

dies of paraph[a]. of y[e] Wife, she is entitled to right of redemption. And if there is a surplus of Personal after y[e] Debts paid, she is entitled to that as well as Widow & also to y[e] exclusion of Legatees. 3 Atk 395.

This right to retain of Paraphernalia ought a debt
duly made, if by the husband during coverture
& not transmissible to her Repr. — as in
case of his legacies them with the consent
may retain, but if she dies intestate her Repr.
cannot. 2 Vern 246-7. 2nd Ca 343 to 345. 1 Rol 911

In Com. all
Debts of a Debtor testamental & per. is liable for the
payt of all the debts testamentary & chiefly
& and then seem that Exr. is not take the Paraphr.
for payt of debts until all the other funds were
exhausted & it wd seem to follow that if Exr. shd
take, he wd become immediately liable if after
real funds were not exhausted — Remarks
in this title seem to render testamentary
subject to same liability, that the heir ext.
alone is liable to in Eng.

The Statute of Com. has made
a provision in favour of Wife which is alter
& other additional & in lieu of Dow & C.L.. It
provides that the Exr. may allow Wife in ad-
dition to her distributory share of Est. — such
household goods & reasonable and, when the
estate is insolvent. and by construction
of the Statute has been extended to Lo land
estates, & also, so as to extend the widow
a reasonable allowance of other articles
besides household goods as, books, cattle &c. &c.
Com 275. 276.)

Husb's liability on the account of Wife's

Separate Estate

remark that y Husb. may join in Bills,
1st for all her debts, 2d for her torts. & 3d.
in some cases for her crimes

1st As to her Debts

For y debts of y Wife contracted before mar: they are both jointly liable during y coverture, his liability ceases with y cov: unless judgt has been recovered agt him during her life. 1 Bl C 443. 1 Ba & 293. 307. 1 Rol 351. Carth 30. 7 Mod 348. The reason of y Rule is, if as his liability grows out of y covenant, or relation in wh he stands to his Wife, it of course ceases when y relationship ceases, — but if judgt being recovered before her death, y case is diffrt. because y judgt alters y debt by converting it from one of the Wife into a joint debt of y Husb & Wife

If judgt has not been recovered during her life, her Exrs must bear their debts and he bears alone. 1 Salk 351. 1 Bl C 443. Chan. 1 Pr Wms 468. 3 Bl 409. Cro J 122.

But if y Husb dies first, & no judgt has been recovered, y debt survives relatively agt y Wife, & Exrs of Husb is not liable — So y relation of Husb & Wife is now at an end, & so is y liability of Husb & Wife's Exrs. Salk. 1 Pr Wms. Cro J 122. 7 Mod. 349. —

Now y Extent of Husb liability seems to be

[illegible] part of her estate fall control over [illegible] she is deprived of [illegible] power of exercising herself [illegible] imprisonment by a discharge of [illegible] debt, it therefore would be unreasonable she should be rendered liable without her fault — here is the cause of her disability, therefore she ought not suffer with her 1 Bac 492. 1 Rol 532.

And it is so on [illegible] plain, that she cannot be taken alone [illegible] in the process in any civil action, [illegible] action, or if taken she must be discharged on common bail-in common bail, 1 Sid 485. 2 Mod 291. [illegible] 1 Wils 149. 2 Sid 124. 2 Ray 73. com. D. Bar & Sem 95. ——— If she is to be taken and imprisoned alone, the case will be, that she is imprisoned for a just cause to remain in, being her own debt, imprisonment alone without her husband, by the interposition of [illegible] husband, she is deprived of [illegible] power of exercising herself.

But if an action is not against a feme sole & her husband, [illegible] there is still liable to be holden alone, for as she was before coverture liable like any other person, she shall not by her own personal act injure a duress [illegible] such as is [illegible] regular. Cro J. 423. 4 Ba 46. 3 Bl 414. Esp [illegible] 1 Sid 314. ——— But [illegible] alone [illegible] husband may take out [illegible] may also at his election, [illegible] and [illegible] judgt. & thus attain [illegible] both

Hus Halle fo. 158 & Lott Mich. 2 W. & M. Carth
30. 3 Mod 140. 1 Salk 315.

If Hus & Wife are Lott taken on
mesne process for a Tort or debt & ye Wife
she is discharged on com. Bail, & her remains
in custody untill he puts in sufficient Bail
for Lott. — for it is presumed ye Husband
& power of attaining bail & her incapacity
arises from ye interposition of ye mar-
ital rights & 2 Bl R 726. Stra 1172. 1 Vent 49.
1 Lev 51. 216. The rule is contradicted in some
of these cases. but the Law is as above.

If a Woman
arrested during her coverture as a feme sole
she will not be discharged in a Summary
way on affr of coverture as notorious
but she is left to plead her coverture wch will
eventually be efficacious. But if the cov.
is notorious she must be discharged immed-
iately.

Wch affr shall be discharged in a sum. way
of all Bail imposed upon Pff by Section
being to be a feme-sole — for this discharge
in a sum. way, is by motion & of divers
Pffs & Defts & in their discretion will
not discharge her under these circumst-
ances. 2 Bl R 726. 903.

Nor can she be discharged in a sum. way
when she is in an action of Trespass and
out ginear of process as ye Law will be

Wife Debt } cont. denied, therefore
y Ct in their discretion will not dis-
charge def. but he may plead the
contents — 2 B & P 233. 1 A R 81. 2 id 380.
Sal 645.

But if a jem. ent. is moved upon
a final process, on Ex vi the will not be dis-
charged in that case unless there is some collusion
between Plff & Def. to get rid of her company — in such case she will be discd. — the
reason of ye is that in a final process there
is no such thing as bail, for ye imprisn.
is not to secure an appearance at Ct. but as
a kind of satisfaction — whence she is
liable to be thus imprisd. as well as any
other person. Sho 1167. 12 Mo 134. 2 Bl R.
920. Cas 8327. ———————————

Husb. liability for Torts of
Wife. 1st. ye rule of law is that the
Wife is liable jointly with her Husb. for her
Torts committed while sole. Husb for
those committed during cov. without his direct
or consent. 3 Bl 1114. Sho 1237. 1 Wils 1119. 1 Ba 295.
Str.

But for torts committed by the Wife by Hus
command, or in his presence, or by the
privity of Hus alone is held. for in all
these cases the tort is considered as ye act
of ye Hus. & he is bound to answer for it
in damages as well as punishment as if

Wife & Torts } explained by the common Law
2 Roll. Abr. 544. Bro. Ab. 454. 355. 451. 1 Rol. 348.

When the Husband & Wife are jointly sued during coverture the coverture holds after his death, for in case the act is done in fact as well as in legal contemplation by the Wife alone. And the reason they are ever joined in a suit is that by her privilege she cannot be sued alone. So when if she without the knowledge of her Husband commits a Tort. Her Husband during his life, by force of her privilege must be sued with her. — But after his death she is to be alone. Palm. 313. Bro. Ab. 356. 519.

But if the liability for her tort arises with a contract i.e. when she has committed a tort, for which she & her Husband could have been sued during coverture considered as hers, his liability accompanies her death. The reason is the one last given from exemption of the Husband. Bro. Ab. 374.

Crimes of the Wife

as to Theft, she does in some cases & shall alone for them — in others joining with the Husband as, for a bare theft committed by the Wife in the presence or by the coercion, the husband is to shall alone. 1 Hale P.C. 45. 49. 1 Hawk. 1 Bl. 28.

But if the commits such an offence in the absence & does it voluntarily, she is to shall alone, & this is done by command or coercion. 1 Hawk. Kely. 31. 1 Bl. 29. 1 Hale 45.

and same distinction is said to hold in case of burglary. Wife? in the presence, by his coercion, he alone is liable — if in her absence, & by his command she is, & case of theft is held alone; but these cases differ from case of bus. her command to commit crime does not excuse her. In case of both, command, excuses her. 1 Hale 45. Ray 35. 4 Bl. C. 28.

Petit larceny misdemeanour — by 4 Bl, 4 other called — By a "misdemeanor" I mean any offence falling short of felony. 10 Mod. 63. 335. 1 Hawk 3 b 5. 4 Bl 29.

If any person commit larceny of a thief who steals a thing by the command, in his presence, & consent of the wife, & takes away with him she is excused & will be committed a mere misdemeanor. She is liable, but it is obtained by a pretence to that intention of the Ct. — benefit of clergy. Theft & burglary are both felonies, & therefore the wife will be obliged to be tried, while the husband is taking benefit of clergy and escapes with a mere fine on record — the woman not being allowed the benefit of clergy, to avoid this injustice & appearance also of crime above presumed now established, & the wife would be excused. 4 Bl. Com 29.

Cyc. Crimes 3 / 3 — Part 2 Principles

crimes, those with are malum in se, as Rape, Murder & Robbery, committed by the Husband joining both are liable — & the Wife is here liable tho' they did not act actual coercion — this exempts the wife from personal responsibility & enormity of the offence. So that it seems that the higher Crimes & the misdemeanors are on the same ground & wife liability / Hale 45. 1 Hawk 4. 1 Bac 9. Sha 482.

If she com. any of these offences alone she alone is liable it acts.

Part of the Wife incurred a penalty of a bond & by her own sole act of this is bound & pay it. not because he was party to & act but as this. She is liable with her & may be sued as a party to y act, or information. This differs from the case of Felonies & Misdem. in this that in these last, by the Form of y Bond Law she alone can suffer. But in y case of a breach of a Bond &c. &c. Scienter is not a necessary, matter. the two must be joined, for he has to pay it. The Wife having no control over even her own person. And theoretically speaking this penalty is in y nature of a debt. 1 Hawk 5. 2 Ba 294.

Wife's Crimes

If a wife receives
a con cealed her husb. who has com? a fel-
ony she is not considered as an acces-
ory after y? fact & thus rendered liable
as she would have been. It is said this rule
is founded on the idea of y? wife, on
y? husb, or a supposed coercion. But?
presume y? is not y? case but it is
on y? indulgence shown by y? laws
to y? matrimonial relation & affec-
2 Hawk 451. 1 ct 11. 4 Bl 38-9. 1 Hale 44.

On all
cases but those exemptions do not ex-
tend. A wife is liable as a sole, for crimes
committed by herself & [illegible]. Hob. 93. 2 Rol
34. Cro J 382.

Wife's power to bind the husb. by contract.

Reason of y?
Wife's power to bind her husb. by her contr? made dur?
coverture is said to be founded on his consent & p?
or implied — & y? assent arises in some cases from
his duty. Salk 116. 6 Mod 239. 1 Bl 430.
This prin. is in many cases matter to account
for in some cases y? husb is bound by the wife's con-
tract, tho' he has expressly refused to be bound, thus
if husb refuses to provide wife with neces-
-s of life procure them upon his credit he is bound
notw? standing y? refusal — & so for any other
reside must the cannot as wife bind him

Wife Contr. husb. Cost. Sum 1 Atk. 451. 1 Ld. 1 Ld
Lal 118. Esp. D. 124.

The ch. that his actual absent is not in all cases
nec. to discharge him. Calls on his wife contr. &
his absent will not in all cases avail him
so that if more obvious principles shd. be stated
to bound without his actual absent, on his ob-
ligation as Husb. to provide her with nec. much
as are suitable to her rank & circumstances in
life. It may perhaps not improperly be said, that
from his duty & liability of Wife to nec. y Law
implies an assent wh. he is not at liberty to
deny — or in other words. y Law hence raises an
implication wh. is not rebuttable. But I
can see no reason for confining to y absent as y
Sum. the y Book seems to lay down this as y
ground of his liability. 1 Bl. 442. Lal 118. 2 Lev
4. Esp D. 124.

The parties case in wh. y Wife
may bind y Husb on y ground of y absent are
1st. when the Husb is an actual absent & when
Seperation consent is made. 2d. Where y
absent is not wilfully given occasion. 3d. Where
the Husb has been in y habit of providing certain
articles for y family & y others have accord-
ingly been furnished — Here there is an implied
assent antecedent. 4th. Where y
articles purchased by y Wife have come to
y use of his family — Here there is assent
ent subsequent. In all these cases

cases of these may be considered without any
objection to be founded on y^e ground of agent. 1 Bac.
429. 1 Roll 96. 1 Ld 120. 128. 3 Burr 1383.
I thus classify these cases for y^e purpose of remark
that y^e wife is not to act as agent or servt. of y^e
husb^d is Employer or Master, whence y^e contr^s she
makes are not her own contr^s but the contr^s
of her husb^d, and his agency. — And by this power
any other person may bind y^e husb^d as well
as y^e wife. But y^e opinion that it is not on y^e
ground of agent alone but also on y^e of agency
that he is bound in these cases. And it will
be found true of y^e wife as such can bind her
husb^d by no contr^s of her own not even for necess^s
4 Bac 430, 1 Ld 120, 126. 1 Vent 152.

After a gen^l credit
has been given of wife as in y^e 3^d class above, it
cannot be determined by any private provision
so as to defeat y^e claim of those who trust her
on y^e same kinds of contr^s, the credit can be
withdrawn only by a notice as extensive
with y^e credit it — for otherwise husb^d and
her will be defrauded 1 Show 96. 2 Vern 643. 1 Bac.
1 Bac 435.

If a wife not having a gen^l credit procures
extra clothes without husb^d knowledge, &
husb^d after, not being willing, he is not
liable — but if he had known them he and have
been liable — for then they have come to his use
& he ought to have known of y^m were

Wife cont. & are purchased during the day
not dispute her authority & assent. — Tit. quot.
tho as to this liability depends upon Law
& not on Contract. Sal 118. 2 Ray 1036. 1 Bla
Com. Eds 442.

This same gen. ground of distinction. If the Husb
owes money & redeem goods thus pledged
by wife either before or after marriage, the Husb
must be sued to pay the money thus borrowed
for Husb money is not a contract for necessaries
& by Law, the wife is not allowed to borrow money
under any circumstances, tho if Husb is some
time in his family compelled to pay it. 2 Show 283.
1 Ld Ray 583. 1 Bol 350.

If the Husb turns away his wife
she can sue at all events for her necessaries —
tho she is guilty of adultery — tho in such
case of turning her away, it must appear she is
never afterwards liable for her necessaries. 6 Mod
Rep 176. Sal 119. Stra 875. 1 Ld Ray 339. 1 Bla
Com 442 n. 339.
But if he turn her away without sufficient
cause & publishes such fact in the papers will avail
him. I doubt cases stated in case of turning
away & her contract, but I think it is not
necessary to refer to Privy, for this liability of Husb is
implied & Law will not allow him to contract
his, tho he may by this means be liable to the
action of the party contracting. Sal 118. Stra 1214.

If a Man allows a Woman to live with him as his wife & assume his name & appear as his wife, he is liable on her contr. tho' they were never legally mar.d & can not sue him for her necesss & plea "never married" will not avail him 1 Lev 41. 1 Sid 13. 64. 387. B.R. 196. Lal 437. — for to allow a man thus to avoid her debts wd be to defraud third persons & it is on the ground of his own act & conduct that he has been treated

actn. of Debt. The case is a suit by ca. & D as the wife & Exec. to recover a debt due to her. Pl. Debt. cont. that "never lawfully married" &c. Def. pleads that he owed the debt to her & D. as Exec. in manner & form &c. & issue is joined thereon.

This Plea "never lawfully married" is good in no civil action except in an act.n for Dower, for in all cases upon civil contracts marr.e must have been lawful B.R. 138. 1 Lev 41. Cro. J. 105 ———

When a Man & wife separate by agreement and he allows allows her a sep.te maintenance & is sued liable for her necessaries after sep.n becomes known in the place where he lived. sep.n is a revocation of the credit wh. is given to a Man & he is not liable for debts contracted after separation

Wife's Debts. 3 Thus however he remains liable notwithstanding she may have left a parties reft. 2 Day 1444. 1010. Sal 116. 6 Mod 147. Esp D126.

But if y^e Wife live apt from him he allows her no alt^n maint^e he remains liable for her contracts — for it is y^e separate maint^e not discharges him & if y^e h^d returns y^e Wife may become a tax to y^e parish 1 Bur 609. 5 BR 604. Esp. D126 y.

Elopement

Elopement with a reducer y^t wife is clearly not liable after y^e elopement is notorious, tho according to y^e current of authy, he is not liable even if y^e elopt is not notorious, but think of Prin. on wh there are 2 is quite questionable Sal 118. Stra 647. 1 Lev 9. 1 Bl 442. 443. 5 BR 603. 1 Will 395. The reason of y^e rule is that by such an act she forfeits forever all rights of Wife as such, & y^e Husb is no longer liable for her. Of course if the Husb forbids him & he still continues to trust her he will be liable for her contracts. Esp. 135. 1 Bay. 6 BR 603. Esp. 135.

When y^e elopem^t is notorious it seems to make no difference whether it was adultress or not, but with regard to y^e former y^e current of authority seems to be, that unless, that the husb is still liable for her contracts 1 Bur. 396. 1 Lev 9. 2 Stra 933. Sal 118.

If after an elopement & adultery she wishes to return & the husband will not receive her, he is obliged to support her or else is liable for her maintenance for want of support, even if she left him for her adultery & lived in open adultery. 1 Hawk P.C. 80. 1 Bac Ab 99. 804. Salk 119. Ex parte Newton. But if after refusing to receive her, a gen. pardon will not avail him, tho' a special one will, so a particular individual will avail him — for that he is bound to support her she is not entitled to have with whom she will, for otherwise she might subject him to an enemy. 1 Lev 4. 1 Sid 89. 2 Burr 1177. 1 Bac 96.

If the husband turns his wife away from his house & leaves her at his own house or elsewhere, he is liable for her maintenance for her necessaries, tho' she be living there with an adulteress; provided if pending such separation & necessaries did not husband shall not be liable — for he gives her by this means prima facie a credit — but that may be rebutted, by proof of her adulterous connexion. 1 Bac Ab 96. Stra 647. 706. 6 Mod 183. 1 Mod 191.

But if the husband is not liable for necessaries during such elopement, neither is she liable — but if she has once received her husband after such an adultery she will be liable on her own contract — but this is questionable, — the reason he is not liable is that the wife is entitled to her husband's society, but she cannot by her adultery be entitled to her husband's society. 1 Sid 89. 1 Ld Raym 1072. 1 Bac 96. 6 Mod 183. Stra 647. Stra 875 n. Esp D 126.

Wife Desertion Separation

The husband is bound to provide his wife with necessaries, and if he does provide them at his own house, he has a right to protection of public as well as individual to trust her - for her requisition of the law is answered - & he may thus terminate any order he has before given her with regard to individual 1 Lev 5. 1 Sid 102. 2 Keny 444. 1 Sid 118.

But on the other hand he cannot deprive her of necessaries & if he refuse to provide them she may obtain them up on his credit & he is obliged to pay for them 1 Bl 442. Esp D 122. Sal 118.

If the husband turn his wife away with out sufficient cause he is bound for her necessaries after a general or special publication or in other words she may pledge his credit to an individual whom he has expressly forbidden to trust her & he must pay for it.

The principle of same kind & humane is made where she leaves him in consequence of treatment which will justify a departure 2 Stra 1214. 1 Bl 442 Sal 118-9.

It is also laid down that if husband compels wife to pay money borrowed by wife - there is law here & with it has the right to recover it from him. But if she borrows money & actually expends it for necessaries, he may be compelled in Ch. tho' not

not at Law, to refund the value of their
services — for at Law if anth. owes a debt
good or bad at first & long he is to be
made good by any matr. of fact: for
in Eq. it must be decided without
reference to y. application. But in Eq.
y. Lender stands in y. place of Vendee
& may recover of Vendor & y. amt. if paid
of y. services. Thus author after with bor-
rows money of A & gives it to B for services
her of the same for y. article & 100 & they are
of y. value of but 50. y. Lender in Eq can recover
but 50. — This is found by y. Executors
v. Adams. Cal 279. 287. 1 Pin 493. 3 Ch 502.

If they live after
by agreemt. & he with is allowed a reasonable main-
tenance, if y. Vendor does not pay y. stipulated allowance, he remains liable
upon her covenant, contrary for services. for
y. benefit of his exempt Estate being taken by
him, he of course remains liable as upon
a Novation 2 Ch. R. 146.

How far Wife may bind herself & Husb.
The joint
Rule of y. C.L. is, y. Wife can make herself
liable upon an contr. whereon she alone
bind her Husb. — her contr. are regarded as
Persons gen. & agent is the contr. of
y. Husb & she, not her principle is exempt

The Husband hereby merged in y^e^ wife her Husband & yet he has no will repugnant from his 10 Co 42. 2 Rol 347. 1 Bl 442.

But the reason & ground of this is, y^t^ y^e^ Law has either deprived y^e^ Wife of her Prop^y^. or all controul over it — it is her Will is not to be bound by her contr^t^. — The 2^d^ reason is that of mere disability — Now a Prin^l^ must more reasonable & more consistent with mat^r^ of Law is y^t^ such a Power given you. 4^ly^ By the old Law hereby forfeited by her contr^t^ she might be subject to Arrest & imprison^t^ whereby the rights of y^e^ Husband might be infringed — whence we see there was reason for y^t^ otherwise fictitious fiction for a Prin^l^. And the reason is easy when we make a contr^t^ contrary to y^e^ Prohib^n^ of her Husband that she has no will, & so void in y^e^ 1^st^ reason or Prin^l^. 1 Bl 359 1 Bl 335. 345-6. 1 Bro C. 101.

Under y^e^ 2^nd^ Rule the contr^t^ of a mad woman or intoxicated person is void but they are absolutely void — as is an infant but distinct^n^ — a void contr^t^ cannot ever be ratified, but a voidable one may, a void contr^t^ may be taken advantage of by any one, but a voidable one can be taken advant^e^ of only by y^e^ Party to this Def^n^ 2 Bl 993. 2 Dy 744 Salk. 1 Bro C 90. 97. —

Wilkinson v. Wilkinson

It follows that as a general rule, that a pers. cannot make a contract & after his death the agents & attorneys shall be at liberty to ratify it, it will still remain, etc. for that was void at inception cannot be made good by matter ex post facto.

But consistent with this rule, that a pers. cannot make a deed & then redeliver it after his death, it will be good, but here the deed takes effect only from the delivery, or what is equivalent to it & what in the case of Lees could as a delivery & the delivery is virtually annulled & executed. For it becomes from the moment a mere deed, not in effect made after contrary to the first delivery being illegal & void & cannot operate to it, & it is in effect & only one, & under void delivery cannot claim rents & profits as coming & title under it some delivery Cro. Jac. 201. 1 Comm. Dig. 20. Plow. in effect of some thing as if a person sole had made a deed & died it was, then to wife was after made had delivered it.

But as an exception to the general rule that of contracts of pers. are void the lease of a pers. &c. is only voidable, & is allowed for the benefit of agriculture, the may void it at any time, but the contract is void & three fair & short days a year, & note & of the use is, under a penalty

Wife tenant by Curt. Cou. 203. Doug 33. 2 Bl R 776. 7 Co 1 Pl. 2 Pl Wms 27. 1 Powell 131.

It shall follow that if a fem. cov. makes a lease she may after the death of her Husband ratify it by any act of hers without renewing it & it may be by an act without words. as by acceptance or doing any thing out of regard to the relation of Lessor & Lessee

and grounded on Reason of the Husband & wife joining in a lease for life or for years of her lands tho by Ld, the Husband & Wife may make a valid Lease of her lands for 21 years 2 Saund 172 a. 1 Roll Rep 125. 1 Rol 349. Bro J 563. Whit 443. 1 Ba 302.

Note. the death of the Husband & Wife revokes a Lease she licenses to all Covenants contained in it as for Bankruptcy &c. 1 Bro 291. Bro J 563-4. 2 Saund 172 a 9.

So if a Lease is made to Husband & Wife & the survivor of them & after his death he as Lessee to one shall pay all the covts. & run with the Land such as Rent &c. but not for such as are merely collateral or attached to the Premises such as to build a house or a wall — the performance of these falls upon the Husband. 1 Whit 443. 1 Rol 349. 2 Saund 172 a 9.

In gen. Deeds made to a fem. cov. are only voidable by her, but Allgts & conveyances entered into by her are void. — for when an Allgt is made to her the rights of the Husband are not misplaced to be offered

affected by it and made for her benefit
and after his death she may either ratify or
waive it at pleasure. If she waive it it
then comes to her Adm. Representative
Com. Dig. Bar. & Fem. E. 1 Rol 349. Is made to
her alone?

If Adm. & wife
are made tenants in com. the may after his
death disagree to & enter. & then as before
& take title as Surv. Ref. is acc. as
2 Bac 27. - 8. 1 Rol 349.

The g. conveyance to them & of a freehold
hereditament must be by some matter of record. or
it will not be effectual - that solemnity
is required in consequence of y. high regard
the Law has for a freehold Co. 3 & 26? -

If an estate
is limited to Adm. & wife with a stranger, the
Adm. & wife make but one person & so take
but a moiety & y. Stranger takes y. other
moiety. The rule arises from y. identity of Adm. &
wife. But if all were strangers they and take
equally Litt sec 291. 1 Inst 187 - 8 Bac 27.

One of a number cannot
be conveyed to Adm. & wife by such words as be-
tween strangers will create a joint tenancy. The est
created is one anomalous in Law - it is neither
a joint tenancy nor a tenancy in com. - they take by
distinct titles. & not of all by moieties, nor
by half & by whole as in joint tenancy. The Adm.
cannot hereby his own act alien even

Wife tenant herself &c. } even his own part & as
never y^e pl^ff can for y^e Law will not allow him
to advance y^e use of his own wrong by
wrong by conniving at 1 Rus. 198. 9 Co. R. 9 Wms
120. 5 Ves. 854.

The Wife may make a valid con-
veyc^e of lands vested in her performance of a con-
dition, as when they are vested in her on
condition of aliening — as to her own. This
is an exc^ep^t to y^e gen^l rule, But it is an
exc^ep^t for her benefit & prevent a forfeiture
of y^e whole 4 Comm. Dig. tit. D. Bar & Fe. 3 Rep.
Leace 84.

Has allowed Jem. con to hold for life. & this
rule & exc^ep^t are, they are permitted & bin
event husb. by their cont^r not only Dur.
coverture but even while living with Her
Husb. for in such case of Alien. has no
control over it, & his right to Tenancy
cannot be injured by y^e cont^r & if she
continued it. it would be considered 1 Bro
90. 91. 1 Wms 519. 1 Ves 246. 6 Bro P.C. 156.
Her cont^r however in relation to y^e husb. do
not bind her at Law. but only in Equity
for if they were binding at Law her Issue
would be entitled to enter & impeach for a
breach of cont^r whereby their rights would be in-
fringed. Her rights not only is bound & bound
only in Equity — for this would be hereby
nor rights of Issue could be affected

affected, for it by its decree will act directly
on them, & not implicitly through the
Ex. 91 = 191. 2 Ch. 379. 1 Rus. & M. 163 = 153. 10
Mun. 149. 1 Ph. 334. 2 N. R. 182.

And even tho' the Trustees be parties in
Equity for the recovery they may thus
obtain Equity without the intervention of
the Trustees, unless the covenant under which
the Trustees hold renders it necessary they should join
in the conveyance for the effectual enforcement of the
decree, but such joining is merely nominal, they
not to convey without their joining & they
& they have no beneficial interest of their
own in the subject & none except in the
defendant's right to the title, — the equitable interest
is in the title alone — & the Trustees
might & ought not have to be affected 2 Ves 191
1 Ch 519. 1 Rus & M 60. 61. 1 Ball 103.

If the Testator
died by Land, & has afterwards realm, or is
transported for an offence or is an alien
enemy — he is civiliter mortuus & his
Will is considered as void. In these cases
there is no sufficient reason for considering the
as a Testator either upon the score of his own
knowledge or their acts — & the Trustees may
be held to their covenant to prevent their
from suffering. And so they may use & be sued
as a sane role. 2 Ch. Ca. 22. 1 Ball C 93. 97.
2 Ray 1147. 1 Salk 232 b. 233. 1 Bos & Pul 350. 1 Ph 182

Wife Court to Land herself. 1 Atk 345. 1 Sal 115. 2 Vern 345. 2 Bro P.C. 231. 2 Eq K 554. 557.

Where she has been holden to be guilty of Adultery or a Foreigner & has remained abroad for years without returning, for in this case his absence from Matrimonial Society is equivalent to an adjudication. Decided only in 1 Bro C.C. 329. on Construction of Act 1 W & M. Sess 1 c 20. 1 Vern 304 n. 2 Bro P.C. 33. 2 Eq K 554. 557.

So also in case of a divorce a mensa et thoro Wife is considered as a feme sole 1 Bro C.C. 96. Moore 66.

By 9 Geo 4 Cap 31 Wife in what limits the Rule, considering the Wife a feme sole as to her contracts, is to be confined there has been, within the last two years, a total desertion in West Indies & a great diversity of opinion.

In the case of Ringstead vs Lady Lanesborough she was held to be personally bound when sep. living from her Husband & separate Estate living in England. 2 Eq C. 126. 1 Bro C.C. 96. 2 Bro P.C. 386-7.

In case of Bunnell vs Brooks. Wife living separate & having a sep. maintenance she was held bound when sep. that Bonds & Notes were written & sealed. & decided she might have Husband sued. 1 Bro Cont. 74. 186.

In the case of Corbett vs Poelnitz, it was determined that the wife living abroad from the

Hee, under article of neh^s. Don-a neh^r Lonas
intervance, might lend herself at C.L.t
of y^e Ct. — & th. not. a mch^t.
else 5 B.C.

In y^e case of D^r Jaillon vs League, Wife had
challeng^d ground that y^e Marr. had abroad &
that she had as a Jame-sole 1 B & P 357.

The case of Corbett vs Pelmitz has gone far-
ther than any other. Does not limit the wife
contr. even to y^e extent of her maint^e. but
this is overrule by the case of Marshall vs
Sutton, wh case was intended expressly
to overrule the case of Corbett vs Pelmitz.
R. 2 B. 108 & onward. Judge Rene does not think that former does
expressly overrule the latter, tho' he admits
that from y^e manner of y^e Judges it is ap-
parent they intended to overrule it. But
confess myself that do think it overrules
it. the case of Marshall & Sutton was decided
by the twelve Judges — the cases at law
on y^e question 3 B.R 682. 4 M & S 765. 5 M & S 605. 1 Bos & P
357. 1 B & P 88-4. 334. 347-8. 350. 2 B.C.R 1079.
1195. 1 Esp. R. 6. 2 N.R 148. 163.

Upon examination of all these cases under
their diff^t circumstances will be almost
interminable, & indeed I think at present
it is impossible to say one decision can overrule an-
other. the case of Corbett & Pelmitz is overruled
& all the above cases are denied from & the
Bar. And there is no doubt but the
Judges intended to overrule y^e case of Corbett & Pelmitz

Plaintiff Executrix, Husband & Wife ...
... of ... Bay. 2 Bro. C.C. 163
2 Ves. Sen. 444. 11 Ves. 501. 2 Bro. C.C. 163

Ob. to suit. Plaintiff maintains that a feme can bring suit from her Husband with a next friend maintain cannot find remedy at all even personally. If her relation real estate is not liable even in Equity unless there is an express agreement to charge it. Tho' if he gives a Bond he it will not bind her real estate. Tho' there is an equal point in case 2 Ves. 444. 2 Bro. C.C. 163. 1 Bro. Ch. 15.

But her rights, her real & personal & profits of her real estate are liable in the Ecc. Court for her contempt, but there does never been a case in which decree has acted upon her personally as it did upon a man by Exec. personalty or otherwise, this emphatically shows a decree may act on her person. 2 Bro. C.C. 21. 2 B.R. 163.

Note it then a general rule all these cases remedy must be sought in Equity &c. Equity alone jurisdiction where will act upon particular specific part. Note Law & Equity consider rights of the Sexes as never abandoned by article of ... & this view it as only a temporary relation which may be annulled by an agreement to the contrary ... A good Equity requires it to be considered. 8 P.C. 644. 1 Bro. C.C. 16.

of fine &c. being repl. without repl. maint. has never been considered Cake in C. court either at Law or Equity 2 Bro in a dictum it was doubted that if the was a Bailiff, she could be liable 4 Bac 456. 5 Ed 582. 6 Ed 604. 1 Bac P338.

But if a Tenant alone. Lends a fine or suffers a recovery she is bound by it tho Cov. Dow is not. She may depart at any time over. But if Cov. Dow afterwards is entitled by y Courtesy. this both at L. & Eq. A for y reason that she is estopped by the recovd to aver y contrary; — to which Cov. and Baron by way of estoppel: 2 Bro Ch 986. 1 Bro Ca. Ca. 2 Ca 74. 79. 10 Ca 43. 1 Mod 341. 1 Ba 301-2.

It has indeed been doubted whether Cov. entitled and Barr by any thing but a fine i.e. whether she could Barr by a recovery from y necessity of making a tenant by y Precipe, the better opinion seems to be she may Barr by a Recovery 1 Mod 341. 1 Ventr 302. 1 Lutw 326.

And if so a Tenant to dower a fine she is liable after Cov. death to a recovery on y Warranties of y fine 1 Ed 456. 1 Ba 302. 2 Chit Pl 6th Ed 48.

But if y Cov. joins in y Writ in a fine it is binding upon both absolutely, for both are Parties & privies? And are estopped from repleading fine. And also on their Alienation, y same 10 Ca 48. 1 Ba 302. 2 Rol 395.

Wife joins herself & husband by ye Ld. Chan.
& Parliament alone cannot by any act wch can take
by which a Fem. covert alien her lands — or
by act to lands of ye aliens. But married
may alien them by executing a power
over a Use, both at Law & Equity. & in
the latter she may also do it by a dec-
aration of trust (wch is a kind of much
every deed but of feoffment under
the power of Revising) or even under an
agreemt. made before marr. by Bill & Wife
its done by consig. her estate to trustees sub-
ject to her appointment — see more of this
p.) 2 Bac. 695. 1 Powell 301. Bro C. 150 a
165. 2 Vez 190-1. 2 Bac 695. 6 Bro P.C. 156. 160-4. 180.

Infant
having a recpt. suffices if Law to state ye
event of proofs of minority & ye incapacity
it is personal, & privilege of Infancy & Pgn.
that he has abandoned them. Rent & the Rt
event to him. but the presumpn may be
rebutted & even by parol testimony. vide
Co. Y. & Powell. 1. Bro C. 124. 3.

A Feme. Cov. cannot
Devise her real under ye Sts of Wills 32 & 34
Hen 8th. the former usually called ye St of Wills
& enables those persons who are capable
to devise, — the 34th Hen. 8 is a declaratory
of the first & excludes Fem. coverts. — Still
however that is to the universal opinion

Wife power to devise } opinion of Ld Judge
that the last Wm was executed &c. the 6th
being dated & indeed both the words
of ye 32d & the 34th H. 8. are mandatory
but title ye Legislature upon fear doubt might
arise, out of abundant caution enacts
ye 34th &c. 2 Co. Rep 354 b. 1 Roll 600. 4 Co 61 b.
Ford D 140 to 146. 2 Wils 2. 2 Cart 556. Lds
above (h) that the inability of sane women
to make conth. was not founded on ye presumed
coercion of ye Husb. But because
per testatrix be founded on that Opin, for
none of the other reasons why they have
their privileges are not here to be offered,
neither on ye right of the Husb to the
person of wife, for ye marriage was not
take effect until her death & coverture
terminated. Nor ye Opin of coercion must
be the foundation of ye rule — but from
proof of another case in which her disa-
bility seems to be founded on that ground.

By a Statute
all persons of full age, of right understanding
And otherwise legally incapable are empow-
ered to devise their real estate & make
other alienations of them. 34 & 35 H. 8.

As to ye meaning of ye words "sane & disposing
legally incapable" the construction put
on ye St 32 Hen 8. furnishes a true rule
of construction for our St. — Here they are

Devise [illegible] "and to any person & persons" were held to include those persons only who were otherwise empowered to dispose of their real est. & to exclude fem. cov. as well as Lunatics & Idiots. And as to words which include those persons only who before were capable of devising &c 1 Bro C C 141.

Words are divided in Com. Calc. 2 Vol 203 and 204 that a fem cov. might devise her real est. with the words "not otherwise incapable" — but this seems overruled — Bacon and so Pitch. J. Rere dissents from this rule — See Opinion in name of his opinion under title Kirby 195. 435. 2 Day 163.

But we have now a new statute by authorizing fem cov. to devise 5th Com. Dig. 2. p. 15. —

and in gen'l both in Eng & this country a fem cov. cannot make a valid legacy of her [illegible] — for if she did she might dispose [illegible] of her right [illegible] & if she did act under her coercion [illegible] 4 Ves 446. 4 Bro 51. Cro C 345. Sho 691. 2 Cas 552. Mod 47. Ex 196.

It has been said, but incorrectly, that she may devise [illegible] as she holds in right of [illegible] &c — this is J Reeve's opinion. But [illegible] the precise rule is. That she may dispose of

an Ex. as executor to himself, which is merely
vesting a power. but she cannot form
a Trust of Confidential nature — Mrs
consent not necessy. 2 Bl 496. 2 Ves 542. Ld
Alsphin 110. 111. 301.

It may however be proved
that funds in Equity which stood to her sole
& separate use, became as to the Mrs would
vest in Equity as a feme sole 2 Bl 438 n Ch.
1 Powell 98. 1 Ves 303. 515. 2 ib 190. 1 Bro Ch 10
3 Bro Ch 6.

On the other hand she may, with her
own consent & any kind of her funds which
it belongs originally to her own: but this
allows of no dividing power, for the share
the mere agent of her Husband more
than any other person might do, under
a title exec. for one person may transfer
assist, make a Will for another. 1 Bro P 211
2 Bl 496. 1 Vern 384. 3 Atk 695. 2 Ves 352. 316.

But Mrs agent to a Devise of all lands
she may accrue to her after the date
of the Will, by the operation of
Statutes. 2 Ves 352. — Answered —

If a feme sole
makes a Will, marries & dies before
her Husband. the Will is revoked by the marriage
for it is essential to a Will that it remain
revocable & remain in Testator,
as this power is taken from Testatrix by

Wife devises } testatrix dies pending dur-
ing the coverture, — the Land never vests
See Ker. 2 Dev. 624. 4 Co 60. 2 Bl R 695. 2 Bl 499.

But devise to
Feme sole makes a Will, marries & dies
Devise to Hus. & the Will revoked absolutely
by the marriage, or does it revive on Wife's
death? Opinions are contradictory on the
question see Godol 29. 2 Bl R 689. Moore
Bos. Rep 149. 2 Bl 479 n. Sk. — see Parker's
opinion Scott v Scott's case)

and a Will made by
a Woman dum sola contr. is notwithstanding
by Hus death the surviving — for as the Will
was void at the mak. it cannot become good
by any matter ex post facto it must be
good or bad ab initio Dow P. 191. 1 Bar 1552
Lat 238. Roll Rep 43 1 Eq Ca Ab 1.

But a fem. cov. may
create a valid charge on land, as it is called but
if something more than receiving a power
of attorney and she has also a mere
agent or instrument of service no power
of her own, & any other might as well
create a charge as the Wife 1 Brad 112 &
n. 6. 1 Bruce. Dig 41. 230-7. Com. D. Bar & Fem
Dig. 1 Bl 58 D 192.

Exception one devises property to a feme cover-
in trust. or on condition. that she may
retain or dispose of it as an other person, there indeed

indeed in the first case the settlement conveys to her and a future husband as tenants in common.

But if a devise is made to a feme cov. to her own use she cannot devise it. For a devise amounts to a grant to a feme cov. to her use her power of disposing she cannot devise is attached for this and to devise her inheritance - not she cannot do. 1 Bos & P 192. 1 Ball 300. 301. But if given to her as a feme she is enabled in Equity devise it. but not otherwise

She may however execute a power over a use, retained to herself & her own use before marr. to convey her own inheritance to such person as she by writing under hand & seal or in the nature of a devise, appoint and the act is here either by means of a power over a use. in Point — & there are two modes by which a feme cov. is enabled virtually to devise her estate. Pow 151. 1 Bac Abridg 316.

Power over a Use. A grant of a feme cov. is settled to her use for life with remainder to the use of such person as she shall by deed or writing in the nature of a will appoint with appointment by will wch shall be good in law & use as at law by virtue of the Statute of Uses — This an appointment by way of a power over a use 2 Vez 6. 191. 11. 2 B.C. 95. 2 Bac Ab. 156. 1 Atk. 34.

Wife devise } It may also be done
by way of a Trust. as where an est. of a woman is conveyed to trustees for her sep. use during cov. in trust for whom she shall appoint by deed or Will or other writing in nature of a will executed by her. such Will, will be void appointt or declaration of ye trust, as much as if she was sole — but this case however the appointee is only in Equity for trust or unknown at Law. i.e. exec.

And it seems she cannot devise or execute a power by devise over her real estate except in one of these ways. 2 Bl. R. 695 2 Vez. 191. Bro. C. C. 149. 1 B & P. 192.

It may be asked why all this appointt, & why may not ye same est. devise in a summary way? I answer; The rules of ye Law throw ye Land devise in either of these cases for you will perceive ye estate is in ye trustees ye. ex & D. who hold ye legal title for her in Equity. She has ye beneficial interest, & ye woman have given her a power to appoint ye person who shall have ye est after her death & have also limited ye trusts by their conveyance to give effect to ye appointt. & that merely in whom appointt is void they intend — disregarding a technical & artificial but a clear

And tho. if ye est. did not move been actually conveyed to ye marr. settl of a title & covenants had been entered into, ye trustees must be obliged

power to devise &c. alleged to give effect to the appointment 6 Bro P.C. 136. 2 VR 695.

A feme cov. may
request her husb. under a marriage agreement
that his will in favor of husb. or
that effect before mar. for or
favor. it becomes absolutely his. & Equity will
therefore enforce the agreement, but the Ct of Law will
not. Decided at Ch a feme cov. cannot hold real
estate husb. Rev. 2156-7. 1 Dez 191. 2 RC 495 n chr.

But a power to convey by deed or devise the property
of another being given to a feme cov. she may exe-
cute it without the intervention of any trustee, for
as shewn above she is free but as between husband
or agent, to dispose of another's property. A person
who takes from her is considered as taking by
virtue of the power by which she conveys, & thereby
seems conveying but not of her. Rev. F. 31-8. Wms
60. Latch 11. 135 139. Sal 289

The effect of agreements between Husband & Wife
made before or during Coverture
will be given

Rule of the C.L. that all contracts made between Husband
& Wife during coverture are void. and those made
before coverture are merged by the intermar.
1 RC 442. 1 Chest 112. 264. Bro C. 557., the old reason
for the rule was that the legal existence of the
Wife was merged in that of the Husb., but the
true reason seems to be the unity of interest of the
legal union, the rights & obligations arising in the

Agreement of Husband & Wife } The same person, being united in Law, the Law allows no Action between them by one against the other. And Qu. that arises by between and in most cases be strictly new party in consequence of the unity of husband & wife both, as, if the husband recover against the wife it would be only to make his own by a legal process and he might remove the same by his own act against himself. If the husband & wife jointly commit a trespass on the land of another & the husband alone is sued he may not plead it as they should be both sued. — and on the other hand if the husband of the wife recover of him, it would immediately become his own, but by the policy of the Law will not allow of such an action. This being the case it would be idle to say that Husband & Wife could have contracts between them — for the Law knows of no right without a remedy.

As a consequence of the rule of the unity of husband & wife no action can be maintained by husband against wife, or wife against husband, for any trespass committed by one against the other, for the law of only legal titles to property & action will not allow the court do enforce them. 5 T.R. 607.

So also if A. had obtained judgment & issued Ca. Sa. against B. & imprisoned him, & then died leaving B. wife his Ex., B. immediately discharged, for B. own wife has now become Ex. & the court keep them in prison. Besides, the being Ex. the legal title accrues to B. by virtue of his wife title, & by other title he becomes

becomes entitled to act in right legal rights as Dft. so that he is now both Debtor and Cred.r & Dft. &c. — So if gen.l rule stands as to agreements &c. where Spot. —

Debt.s made between Hus & Wife decr.d events &c.

agreem.ts made between Hus & Wife respecting Spec. Prop. is valid per words given p. ante. — and if Ct. recognize no right of Wife & hold liberate Spec. Prop. 1 Bro C C 84. 1 Ves 96. 3 Atk 369 &c.

A Deed of land directly from Hus to Wife would accord.g to g antient rule of Equity, as it now is at law. by reason not only of Hus right to Wifes Prop. but also from g inability of any coercive remedy between them — & the Law knows g no right without a remedy. 1 Inst 112 a n 1. 112. 1 Bro C C 84. 2 Ld Cas 9.

But it is now settled in Equity that g Hus may settle Prop to g sole & separate use of g Wife & this too without g intervention of Trustees, & agreem.ts respecting g Prop. even with g Hus may be bind.g. Covenant may be bind not so at law. & this because g Ct of Eq.ty will enforce & construe g Trust directly, & without invading g Spec rights of either party — wh g Ct of Law cannot do. 2 Vez 66 g. 3 Br C C 414. 2 Vern 64. 1 Atk 270. 1 Vez 163. 517. 2 Ch Ca 91 m. — 1 Bro C C 16. These cases the most recent & are now in my possession.

A few years ago, it was decided in

Covenants of Husband & Wife [illegible] to a Deed of Land [illegible]
Comm. that a feme cov. cannot hold such Estate
but it is now vested in Husband 1 Day 221. 225.

And in these cases when the cov-
enant is with both Husband & Wife, he may
sue him at Law in his own name by Action
of Debt 1 Roll Abr 348. 1 Bonlam 99. Pl Ca 495. 2 B.R 1152.

And it has been
determined that when Husband & Wife by mutual
deed industry agreed to allow her a part of
the avails of it, the agreement was binding & might
be enforced in Equity. 1 Ch. Ca. 37. 1 Salk 149.

A Donatio
causa mortis by Husband to his Wife is good in
Ch. & Equity it would also be good at Law
for it is a testamentary gift & there never
was a dispute but that he might devise
to her 1 Prest Abr. 1.

If a Husband covenant with his
Wife not to molest her but he is out
of the Realm & is by Covenant &c. She is not bound
to wait upon the Covenant to obtain her remedy
but may obtain an injunction in Equity
1 Roll Abr 347. 1 Atk 334. 2 Vern 351.

Obstacles of agree-
ment to the wife can enforced both at Law
& in Equity. & if Husband should molest
the agreement she may obtain relief by a
Bill in Equity. Bac Abr. 2 Roll Abr 347 & Bac
Abr. Title Agreement 3 Rep Ch 64. 2 Vern 396. 671.

& Covenant bound by mere agreement only tho' the consideration of the terms of the agreement, after they have agreed to have settled & executed the deeds, he did have the same bound over to be sd have had, but then been no agreement. Tho' if there was an express agreement to the contrary, he wd be bound of right, but a bare agreement of exp. is not sufficient an abandonment of his rights 1 Ba 290. 1 Vern 261.

Contract made before marr. between persons who afterwards intermarry.

If a man & woman before they intermarry, a man is indebted to a woman, or she to him & they afterwards intermarry, & marr. extinguishes the contract. For the reason given sup. 1 Bl Rep 442. 3 Wils 234.

If Men of Wars being indebted to the King by bond executed before marr. dies having the bond uncancelled, it does not revive, for a personal contract suspended is forever extinguished 1 Bl Rep 442. Cro. E. 551. 2 Roll R 254. 2 Bac Abr 10.

And if the obligee of a Bond marries one of several obligors & sues both in debt, he discharges the rest, for he has made his election by the marr. to charge the husband only. 1 Saund 99. Cro E 551. Com Dig Bar & Dow. D. D1. 5.

Under the present Rule a distinction is taken between a contract executed & duty in the Wife during

Ld. Talbot held before me 83 denying a contt. to one which does not. a contt. before mar. or a promise then made to have the intended wife a sum of money after his death. he always has attended to be good both in law & equity further more y[e] Testimonial are originally else whether of arises, for no claim accrues till after covent. terminated Lal 335.–5. 1 Bro. 93.

Ob to a penal Bond made to the intended wife, to have the sum of money after his death, there has been much contradiction & diversity of opinion. It was contended that the penalty was in nature of a debt & as such was discharged by y[e] mar. this was the doctrine opinion, but remained unsettled till the time of Ld Hardwicke when y[e] K.B. unanimously decided y[e] Bond to be good Lal 325. Barn 511 – Com Dig. 5 Bac 361.

That such a bond was good in Ch as evidence of an agreement there has been no doubt but in those cases the Chan[r] considered bonds void at Law 2 Bro 43. 2 Vern 420. 2 Atk 97. Pr Ch 204. 2 Vent 343.

That a promise by y[e] husb to have his intended wife a sum of money on his death, was good was decided as long ago as y[e] time of Ld Talbot – but it is observable that Talbot guarded with-out his opinion was overruled & thereby

Law settled 4 Mod 215. Cro J 571.

The Wife
by accepting a Jointure before marr. bars
her right of Dower, for that is a contract
in contemplation of marr., a provision
for a family & has an effect without a
marr. — & was never considered as setting
aside by a marriage 1 Roll Ab. 2.
2 Bl 137. 1 Salk 173.

The Law regulating Jointures is fully
settled in 27 H 8 c 10. The
Requisites to a Joint. under this St. are
1st It must be limited to take effect
& take effect in Poss. immediately on
the death. 2d It must be for
her life at least & not for any life or
other. 3d It must be made to
& for her, & not in trust for her.
4 & 5th It must be in satisfaction of
her whole dower. If it has
not all these qualities it will not be
construed as a Bar of her right of Dower.
It has indeed been said that a Joint. must be
expressly to be in Bar of Dower, but express
words to be necessary. — But it must be in bar
of dower, may be inferred 2 Bl 137 &
140. 1 Roll Ab 360. 4 Leon 2 Bl 138 n 8th. Vaugh 33
The Phraseology of 27 H 8 c 10. is such
that it has been doubted whether a Jointress
can elect after the death of her husband.

Contra if Devise to Wife & Pro. Comm. &c. during
W. freehold always to come after end of Lease
Devisee shall not have reference to Answer
Lower than a freehold — but it is now
settled that it must be a freehold Estate
or Estate

Yet an Agreement of Wife to accept of Money
pt of Money when Profits in lieu of Dower
may in Equity be enforced. — Why not
at Law? The reason is there a Court of Law
has no discretion, & only ascertains Jury
ed accidents & do not know whether
in lieu of dower? But Ch acts differ-
ently & they will not enforce the agree-
ment unless it is of equal value with
the dower — so that here there is no danger
1 Ves 56. 1 Pow C. 53. 1 Brad 36 b.

If a Joint is made after mar.
& any may after the death of
election either accept, & upon it & take
Dower — for a Joint being made during
does not bind her. — but she may take
both. 2 Bl 136. 1 Bulst 137. Cy 356.

And in case by bringing a Writ of Dow.
or the waives a Joint upon facts 3 Co 23a
4 Co 56.

And if a Wife agrees to accept of a gift by
devise instead of dower, she may after the
death of Husband enter & agree
the devise & Heir is not bound herein the

Cont. "of the H. Court or" Ct against it is made during coverture. It is yet the wife not to be bound by such agreement made before coverture. It is yet in these cases she may not bar the curtesy if it is expressly in the deeds to be in bar of dower and the reason of yt rule is that a fine & deed acknd can be admitted in evidence of yt it of 3 Co. 82. It shews that the deeds was intended to be in bar of dower. — The contrary was once decided, but that has since been settled in the House of Lords not to be law. 1 Bl. R. 5. Cro. C. 125. Raw. 2 196. 1 Sid. 356. 2 Ray 1136 & 1160. 1 Eq. Ca. Ab. 219. 2 Vern 365.

But tho the deeds be not expressed to be in bar of dower, still she cannot take both the deeds & dower, if the heir has devised away all his other lands. For it is part of the consideration of both instruments that the deeds was to be in bar of dower. 2 Ray 1136. Cro. C. 126.

And in relation to these agreements it is settled, that a man cannot covenant to be called in Equity to an account. 1 Raw. Ca. Ab. 95. 2 Vern 480. 1 Eq. Ca. Ab. 95. 1 Salk. 155. 2 Salk. 523. 1 Salk. 93 & 95.

Husband's right of power over person of his wife

A husband is injured in his person by slander, but not another, & if others have received consequential damage he may sustain an action

Person of Wife } action in his own name
for that damages, as in case of battery, false
imprisonment, slander. But in an act. for the
loss of the wife must be joined

Ans. of act. for consq. damages must be
laid with a per quod. "Per quod consortium amisit." The old act. was laid
for injury to act. per quod servitium amisit. 1 Sid 345. Cro Jac 501. Yelv 206. 1 Lev.
44. Com. Dig. Bar. & Fem. W.

So also when has an act. of same kind as
a person has to Crim. Con. with his wife, he
here then must be proof of an actual a
lawful marr. — So an act. will not lie
on a marr. de facto only. 1 Burr 2058. B. & P.
27-8. Doug 162. Esp. 540. Park C. 330.

But if the Plea amounts to a bar of the
action will not lie, or if may be voluntary
non fit injuria, for they then shall not then
be allowed a recovery. But then may main-
tain action for loss of act. 4 T R 651. 1 Lee
13. 14. 15.

It has once been decided, that if the
husband if tried in a state of open incontin-
ency, he cd not maintain the act. for loss of
wife, but since that decided that it was
only in mitigation of damages. 1 Esp R
15. 1 Lee 15n.

It has been said that the act. is not
an act. for the loss of the wife by reason

consortium ergo cum. Evid of the marriage may be received 5 C&P 257. 2 East P.C. 992. [illegible] for D. may be the means of the separation

If a married woman is allowed by her husband to live in a house of ill-fame, he cannot recover for crim. con. with her. Bull. N.P. 27. Peake R 99. 1 Selw 15.

But if she is in a state without [illegible] knowledge - the fact did go in contradiction of damages but this knowledge takes away from it the sting of exciting ill will &c.

Mere neglect or inattention to wife's comfort goes only in mitigation of damages & does not take away from husband right to recover but does not amount to a consent. 4 C&P. 631.

On aggravation of damages. Plff may give wife's rank, her previous good behaviour & domestic harmony in which they lived, the loss & anguish of Plff of any kind such as a breach of trust, of the rights of hospitality &c. BN.P 27. Esp. D. 343. 1 Selw 300.

On mitigation of damages. Defendant may shew ill treatment of his wife & refusal to maintain her, turning her away by her elopement before act, previous elopement indecent manners & inconstancy even before marr. 4 C&P 653. 2 Esp. R 502. Bull 16 1 Selw 30. 31.

But he is not allowed to give in evidence in mitigation of damages any misconduct of wife after separation, for [illegible]

Selw.

Crim. Con. } wife may have the cause
of criminal conversation misconduct. 2 Bac R
552. 1 Sel 91.

According to old L. if the husband
give the wife moderate reasonable correction
he is not liable for her misconduct, but if he beat her violently or threaten
to do it he is liable if she quits his house
for him to sue or attain a divorce in
the Spiritual Ct - the Spir. Court can't
113. 1 Roll Rep 121. 1 Bl Com 441. 4 Inst 12. 1 Bac 235.

It seems however by the latter opinions
that now he is not allowed to use any
personal violence in any thing as to
restrain her any more than be a stranger
if he did, she can bind him to the peace
as she also can her if she threatens beat him
— & we have cases on both sides. 1 Lid 113.
2 Lev 125. 1 Bl 445. 3 Keb 433.

He may however impose restraint upon
her liberty in case of gross misbehaviour
— & of course may use all necessary violence
to effect this purpose — for instance if
he shut. abusing his servants. giving to
the poor &c Sta 475. Com. Dig. Bar & Fem. C.

But if he confines her without cause
& with unreasonable strictness or severity
he may be indicted by an habeas corpus
Com. Dig. Ch. Sta 1478.

He may justify a

a Lattery in defence of him, & he may
in defence of him. Each may justi-
fy a battery in defence of the other Spencer
& may use only defensive. 2 Rep 282. Bac Ab 239.
B. N. P 15. Esp. Dig 314. 318.

Quaere if Husb & Wife to testify for and other
Not the general rule is that they cannot testify either
for or against each other, their union of interest &
policy of law seem to be foundation
of general Rule 1 Inst 6b. 1 Bl 443. B. N. P 286. 1 Sk 678.
And if they cannot testify when the Wife is
injured even as to his own interest, is not
in law for or against himself, as in case
of his action in trover & sale & use
of the Wife, taken in Exn for the debt, tho' no
thing but damages against him, the Husband
testify that the property was the Wife's, the general
rule of excluding testimony in subject to one
Broom 1 Bl R 578. Esp. Dig 241.
Neither of them is allowed in any case
even if between third parties to give evi-
dence tending to criminate the other, as in
settlement case where settlement of Pauper
Parish, the mother of bastard child, is in ques-
tion, if wife cannot testify for a former master
of Father, & then the Defendant wants to cross-
for it and he to accuse him of this crime. Bak
Esp 4-5. 1 Bac Abr 107. 1 Sk 665. Hagl. 2 May 762.

Husband & Wife } A woman divorced
a vinculo matrimonii cannot be a witness to any fact which arose during cover: for that tends to impair the confidence between Husband & Wife during cover: & thus the Law will not allow to be impaired by any jealousy that might subsist between after cover: Peak E. 175.

But after a divorce a vin. mat. she is a competent witness to any fact which arose after divorce — the above reason does not exist there.

It is a gen: rule of evidence that a man may testify against himself & with consent of his Council for himself, not so in case of Husband & Wife. The C.L. will not suffer Wife to testify for him even if Wife council and permit it — for her testimony might prove to the detriment, as if she testifies at all, she must be subject to a cross examination Ray 1. A. Hunt C. Peak E. 175. Mod. Ca. 264.

But to the gen: Rule there are some Exceptions

1st It has been said & cannot be some opinion is in force that in case of Treason the Wife may testify against Husband, the duty of allegiance being paramount to every private duty whatever — domestic or other — But it is now doubted Ray 1. Hale P.C. 301. 2 Hawk. P.C. 606. contra — 1 Hale 301. 2 Hawk 606.

9th Excl. Whenever the Wife exhibits a complaint against her Husband, & desires him to give good behavior or keep the peace, as she may be a material witness against him, this may be ordered on motion. 2 Hawk 484. R.N.P. 294. 1 Burr 148. 1 Bl 445. Str 633. Say. Rep. 173.

So when a Man is bound to keep the peace & refuses to find Sureties, he may be committed to Gaol. 2 Hawk 135. 1 Mod 144. Str 633. R.N.P. 294. 2 Barnard. Rep. K.B. 443 in Mr. contra Say. Rep. 161.

10th Exl. Where a woman is forcibly carried away, & married against her Will she is a competent Witness against the Man & Parties to prove the Marriage — but after the Marriage is over & cohabitation by the space of one month or more, she is incompetent being guilty of the Felony — & under the Statute which says that the Husband shall give evidence against the Wife. Cas. C. 485. R.N.P. 286. 2 Hawk 606. Bac. Abr. 174.

11th Exl. If a man marries having a former Wife living, the latter second Wife may testify against him for the latter was not a legal marriage & she is not his lawful Wife. So in case of Indictment for Bigamy, the first marriage must be proved & not presumed, she is a competent Witness

Evid. of Hus. & Wife } Witness as to her own marriage B. N. P. 287. Esp. D. 721. 4 Bl. 163. Peak Evid. 174.

[illegible] in an act^n between [illegible] Hus. & Wife has been permitted to give such evid.^e as [illegible] indirectly charge her Hus. [illegible] tho' not criminality, as to prove the goods for w^h y^e act^n was brot were purchased on y^e Hus. own account [illegible]. 1 Stra. 504. Bull. N. P. 287. Esp. D. 721.

But when [illegible] in an act^n between third persons [illegible] tend indirectly to criminate her Hus. she is not a competent witness. 1 M^c Nal 161-2. 1 East 301. 4 T.R. 564. 1 Bl. 443. n.

Nor can she testify when the evid.^e [illegible] operate indirectly in his favour, he being one of several of the party. as in an Indictment for a conspiracy ag^t several of whom y^e Hus. was one of Defts, she cannot testify even for y^e others because if her testimony goes to disprove y^e conspir.^y it goes to excuse her Hus. 1 M^c Nal 162-3. Stra. 1095. 5 Esp. 117.

If however there was no evidence given ag^t her Hus. [illegible] suppose she w^d be a competent witness — this seems to be implied in Stra. 1095. & 1 M^c Nal 162-3.

[illegible] been determined that a declaration of a Wife as to a transaction within her immediate [illegible] may be proved in [illegible] third person

Parsons — This is an act. agt. of Wife for running
his child. It was allowed to prove by a third
person that y. Wife had confessed a certain vari-
ance which was stated to be said the 5th
St. Tr. Rep. Eng. & Ir. 721. — This rule seems anomalous
anomalous, for it goes beyond the cases of com-
mon agents, in which cases their declarations
at y. time of the transaction may be given
by third persons, as part of y. res gestæ, but
declarations of them either prior or subsequent
to the act cannot be proved

In what cases y. Husb. & Wife must join in actions
and in what sue alone

In some cases in
wh. the act. relates to her right Husband must
join the Wife in, other he cannot. In
other he may unite at his election

There is a clear and obvious distinction
between all these cases, but it is absolutely
impossible to reconcile the decisions
for in some this has been overlooked.

It is a gen. rule
that when the right of act. and one of death
have accrued to the Wife, she must be
joined in the suit in person. 1 Rol. Abr. 347. 1 Mod.
164. 3 Mod. 631. 1 Ba. Abr. 304. Therefore if y. sue is
that of y. then of one alone she and attach a
note right of recovery in trover of the
of case must be sued y. Husb. of her legal
agent

Joint def. in act. 3. On the other hand the cant. can sue alone not only on account of his rights by grant & survey, but he can constitute an attorney & exercise all the rights and liabilities to be imprisoned of judgt. and so after her, for she is imprisoned 1 Bone 309.

In pursuance of this rule of equal action in Ct. between wife and husband she must be joined for injuries done and received to her. 1 Bulst. 1 Roll. Ab. 344. Ba 304.

So also in Ejectment for her lands, demise & joint, for same reason, but this is actually not a real act. Cro C 193. 1 Brownl. Rep 201.

So as to act. on wife alone in act. where had before event. it is void. 2 Brownl 193. Cro C 523. 3 Mod. 231. 2 Mod 218. 2 Roll 576. 1 Roll 347. contra Cro C 118. & says it may either join or sue alone at election. 3 Lev 413. 2 Vern 395. Vin Ab 576. — Attaint of will alone is void notwithstanding & offering accr.

Rule of some in an act. between Cant. for April rediderate & it. satis. 1 Roll 15. 347. 348. Cro C 203. 1 Cro 55. Com. Dig Cant. A.

So also in an act. on a promise made of Bond rehiderate & it. satis. 1 Sid 25. Com. Dig ibid.

So also for injuries done of wife during cont. as battery, slander, false imprisonment &c. indeed of claim here is such of the cant alone the cant may release & discharge as the other plaintiff in act. 2 Roll 1108. 1 Vent 328. Cro C 501

Bac Jo 601. 536. 601. Esp. D 315. 1 Selw. N. P. 2011 3 ed.

So in an act. for [illegible] entry for land
he must join, & it was [illegible] 1 Lev
A. 1861

And Note it must be settled that in an
for cutting the Wife tres during cont. he
must join in pl. act., but a contra opinion
is advanced in Ventris & Dongan seeming
affronted of pl. doctrine but the case will not
support it. Note I above it to pl. Treasure
1 Rol 344. 8. Moore 482. 2 Wils 424. Bac E 95.
contra 1 Vent 195. Com Dig Bar & Feme N. in wch
ad. attorney wth we will find the case
irreconcilable

In an act. for destroying com-
mon enclosures growing on pl. Wife land
such as raised by annual labour as corn -
grain &c, the act. may be but Esp. tells
alone for it did not remit to the wife
enclosures go to Exrs Reb., Atw
said that they may ben join his Wife or
not at his election, but pl. Counsel is in
error — that there are cases where he
his election but they depend upon a diff
principle. Bac E 93. 2 Vent 195. Com D. Bar E. —

In an act. for cutting & for destroying or
injuring pl. wife growing on Wife inheritance
there is no doubt but they may join the
wife, but Note at that the must join
her as in the case of cutting her trees. for the

When joint debtors & the goods and money to be divided, not a bill from them entitlement raised by criminal taker. Burt. 2 Pp. Com D. Ba 86. C. Ex & Eq. 2 White 424.

In those for infants part of the concession was before covenants & deed made to join. for marriages at home of marriage was a chose in act. 3 Sk 634.

But here. Settlement was taken before marriage, but not executed the day of marr., did settlor die to join? I think not, = day of marr. in legal contemplation the property is left in hands of a trustee, no division Bart Ref. Ch , Sac Ms. Ba 82. 1 Ba 267. 2 Lev 69. vid no. 3 Sk 634.

So also for injuries done the person such as battery, libel &c. cannot join in & sue as debts &c. — Settlor should have covenant not alone 3 Sk 627 1 Rol 347. 1 Ba 366. Moore 882.

Thus are done cases in act on prin. of the money with alone & join & libel relation. Thus if the testator paid former one the wife while not & they assigned from him, he may sue either alone but if alone & join the libel relation for the wife cannot sue alone & claim of course the debts [illegible] from

from his Prof.n, as he may treat the proceed.s of his
right and as pursuing his wife right Ld Ray
459. Moore 564. 422. Com D. Ba. & E. X.

In debt on contract for Rent accruing out
of Wife land dem.d ejectm.t he may sue alone
without joining wife, for by Ct. He is right of act.
belonging to the Wife, & Interest accruing
during coverture he may in consideration of having
assign.t to absent & her interest or defeat to
it who treat it as his own. Salm 207. Com D.
Ba. 634. 11 Co 51. Cro Ell 572.

If a Lease is given to Husband & Wife during
coverture, or if Lease from he may either
sue alone or join Wife in. he shall right
to absent & Wife interest or Interest to it
& then treat it as his own Stra 236. 4 T. R
716. 2 Vez 575. — 7. 1 Salk 114. 2 Ld Ra 67.

Quere. If Husband is given to him &
Wife during coverture, & he waives actually ab-
sents or defeats to the interest does it en-
tire to his use during coverture? & can the main-
tain an act.n upon it? & if sole ——————
see Book Ab. Ba. 12 & pleas thereto.

If Land is given to the Husband & Wife &
Ass.s to another, who may sue alone or
join the Wife, & so also if the Land was
given to Wife as Ass.s — & the is in right of
Land and dead Wife during coverture, & upon
death of Husband & Wife may treat it as his
for whole estate in. to the Wife or her heirs

When Jo is in Lat. } title, subject to account
for what he receive upon it, to Testators
estate a Ves. 4 BR 616.

And it. Where a sum is by the choice
to one alone he may declare upon y Bond
as given to himself alone, & it will be
no variance, because of the choice to receive
it to his own use becomes so in legal effect
it acc. 4 Ves Jr. 309.

And if a Bond or other Per. obligation
is given to given to Wife alone during coverture
She may sue alone or join y Husb. at
election. for the gift of the Bond is considered
as a gift of any other Per. Prop. to her during
coverture, & he may treat it as hers or
not — & whose Ex. entitled 2 Ves. Jr. 1 Ves
376. 1 Bro C.C. 92. 1 Cox 418. 2 Bro C.C.
cd. & the point whether the Bond will survive
or not see Mr. Ch. Ld. Rich. Ca

If a Legacy is given
to the Wife during coverture she may join y
Wife in an action for it or not at elec-
tion, id. note. 1 Atk 165. 1 Ves Jr. 2 Ves 34.
2 Esp 218. 1 Ca Ch 432. 4 Ves 411. 5 BR 694. 1 Salk 116 — 9
Q. y question whether the Legacy will survive
to the Husb. or not, you have given a pos-
sessory property — the better opinion
is that it does not survive but
continues to belong to them & would not
survive to y Wife

the Lessee alone? he must sue alone. he can't join, tho' in consequence of the battery committed on the Wife then in the house of her master, company &c., he is by law alone 1 Lev 111. 1 Sid 345. Sal 205. Cro E 89. Cro. Jac 511. 535. 1 Rol 791.

In this case of assault must be laid with a per quod servitium amisit of the Plff. This act has usually been called an act. of trespass. Vi et armis & illicite & of Eng. form, but I think it ought to be cast - it being for consequential damages. — The courts have been divided - & Sanderson upon the various cases, but finds it agt. it. 2 Saund. 295 & Post 331. Esp. Dig 245. 1 Lee 4. Sims D. 11. 13.

If a battery is committed upon the Husband & Wife at one & the same time, they cannot join in the action for injury done the Wife - the battery of the Husband & Wife is an injury to the husband alone, for the injury done to the wife - & recover consequential damages. — But the Husband must join for, for injury to Husband & wife cannot be done Cro Jac 511. 535. 365. Yelv 89. Sid. Car. 91.

But if the wife dies, for personal injury, personal damages abate by death, as battery & injury done the Husband, for which he

for damages done to the [illegible] by reason of the damage on the injury, may state in [illegible] the [illegible] of the [illegible] right to join & write for the injury done to [illegible] 1 Mont 328. 2 Dall. Cas 535. 1 Yeates 163. 1 Binn 166.

Or if in such case the Deft is found not guilty as to the [illegible] but guilty as to the [illegible] the Plff may take judgt. on the verdict so it will stand — for no damages are allowed except for the injury for such they had a right to join Cro Jac 535. 2 Vent 29. Bacon 166.

If a prom. is made to the Plff in consideration of something to be done by the Plff to the advantage of the Promisor & the Plff does the thing & the Promisor receiving the benefit refuses to perform his promise the Plff may join both these facts in his declaration & state the promise as made to himself. Cro Jac 180. 1 Saund 116. Bac Ab 603.

An action for [illegible] & [illegible] & [illegible] & [illegible] for the injury done to him alone. Mod 205. Bac Ab Tit Case. Vin Ab.

Tort and [illegible]) [illegible] for the injury done to the [illegible] must be set forth both, but a Deft is liable for the tort alone for [illegible] & [illegible] the damages [illegible] & [illegible] for the tort in the matter of [illegible] for the taking of

Ass. alone & servant the breaking is the gravamen Sho 61. Esp 9407.

In the short hand a dec" by Hus & wife for false imprisonment of wife, her only the husband remained undone, or he sup: any special damage, & that 6 & joine damage of Hus & wife is good after verdict. non is void alone the wife cannot join in an act: per quod — but they observe the imprisoning is the gist of plaint: & per quod but matter of aggravation 2 Salk 119. 6 Mod 124. 1 Ba 305 7. Tho however seem to assent very clearly, that a dec: stating, false imp: of Hus & wife per quod is good after verdict but do not determine it after verdict.

It is a gen: rule that if ye husband alone sueth he ought to join, & if both join they sue, & mistake is incurable & not aided even by a verdict 2 Bl. R 1235. 1 Vent 328. Sho 61. 229. Bro C 133.

But if ye husband alone sueth & recovers & dies pendente lite, & the wife remarries only is abat: & the reason of ye exception does not go to the merits of ye case. Bro Ab, judg. 520 ye reporter in such case, if the wife & husband may bring a writ of Error & reverse ye judgt: 1 Bl. R. 115 7.

of ye Def^ts adverse no interest in ye suit
till an Dem^r certainly on special dem^r &
stream also on gen^l dem^r, then in a cov^t
for anything but in Ejectment with a stranger ye
Wife interest — it is like or Dem^r for the age.
not a joinder ye husband must be named Plaint
— But has been said this is like after verdict
2 Wh. R 406. 407-8. Cro J 644. B.B.R. 53. 1 Dall 311. 312.
But I think it a good afterwards because
ye Wife may have an interest at any rate
& as ye cont. does not appear, ye Court will
not presume she has no interest

When the Husb^d & Wife must be joined as Defend^ts
Re joint Cov^t
Rule is that if cause of cov^t survive agt the
Wife sole must be joined with her Husb^d as
Def^ts for otherwise the Def^t of Husb^d be im-
pune, thus as Debt agt Wife dum sola
while sole the Husb^d is liable for all antg. Deb^ts
in the cov^t in which she is named & rep-
resentation must be made 1 Burr 351. 1 Bac
Ab 1 Mar. E. 348. 3 Bro P.C.

If an Act^n brot concerning lands held by the
Wife as hers, she must be joined as Def^t
Com. Dig. Bar. & Feme J.

Debt ag^t an Ex^x for a tort committed
by Wife while sole — it will lie. 1 Burr 133. 351.
Com. Dig Bar & Feme J.

Chan. Abridgt. 69 } Lease of Lands but
Brewer Rent due from Wife before cov.
entire — and it is a general rule at Law
that they must be joined in such Actions
as lie before cov.t is broke. 4 Bac. 369.

The same rule holds for Lots comm.d
by her alone & without the Security & cov.t
cov.t for these survive agt her. Cro. E. 301. 1
Wils 149. Stra 1237. 1 Rol 6. 1 Leon 316.

If a Lease is made to the Husd
& he & D.r for rent accruing dur.g cov.t is to
be brot agt both — for y.e Wifes purchases are
only voidable & they are presumed to be for
her benefit, & she cannot avoid it dur.g cov.t
for the same wise kind remedy by the
different Law she can by the other. 1 Rol
346. 1 Ba 319. Com. D. Bac. 69.

On the other hand y.e
Lord Hale is, that when the cause of action
accrues agt the Wife & the Husd must
be sued alone, thus a feme sole living a Lease
marries & rent accrues dur.g cov.t
the Act.n for y.e rent must be brot agt Husd alone
for it does not survive agt her, & as Husd
& wife lose y.e Land & she in conse-
quence of her disability cannot command
the money & pay y.e rent. — Husd alone
is liable — The rent accrued before
cov.t y.e Act.n is before & is to be agt.
both. Hayes. Com. D. Bac. 69.

If a promise is made by Hus & Wife jointly, Hus alone must be sued upon it, for ye promises of the Wife are void by ye C.L. — Her purchases only voidable. Palm 313.

If a battery or other tort has been committed by Hus & Wife jointly, Hus must be sued alone.

And ye rule is ye same if ye battery or other tort was committed by Wife alone in Hus presence, by his coercion or command — for ye tort is considered as ye sole act of Hus. Palm 346. Cro. C. 184. or 355. 2 Lev. 101. Com. Dig. Bar. & Fem. [illegible] Pleadr. 2 A. 3.

And yt is ye genl Rule as to torts committed by both in one. 1 Rol. 348. Yelv 166.

If ye Wife is joined as deft when she ought not to be, or omitted when she ought to be joined, ye writ may be abated, & further, if it is not pleaded in abatt. it is error & a motion in arrest of judgt may be sustained after verdict, or a writ of error maintained after judgt., Thus, in an act. of slander agt Hus & wife for words spoken by him alone.

So on ye other hand in an act. agt Hus alone for a debt due from his wife while a sole [illegible] ye same. Cro. J. 356. 1 Vent. 73. Yelv. 106-7. 7 T.R. 348. 1 Sid. 313.

If a fem. cov. [illegible] is sued alone

[illegible] Eq. a Eq. [illegible] Court. [illegible]
Francis [illegible] may [illegible] for [illegible]
own name, or by a sci. fac. in pltff's
name of Ben & Wife, for Pltff having her
and then as sole shall not injure
her thereby [illegible] Daugh. Pltff.

The Wife when sued with her Husb cannot plead alone, but Husb must join with her — for by reason of her disability she cannot plead in Chancery neither can she constitute an [illegible] but Husb can & must appoint one for both. Ens 9 239. Ca Ch 215. — Husband alone may plead alone for himself & not at all

The above relative duties of Husb & Wife

Of Marriages

Void & voidable Marriages

Void Marriages

Marriages which are void, voidable, or void.

1st Void Marriages

Absolute incompetency of the parties that marriage shall be considered as a contract merely civil. In Eng & other States generally, the solemnization of it is provided for by St. 26 Geo. 2d. Mar. Act

Observe generally that by our St. there is no publication of banns, & that there is no obligation to marry in a church — may be in any public place

When either of the parties is a minor
& the Con. requires both previous publication
& consent of Parents or Guardians also. —

Every one
who shall celebrate marriage otherwise, than by
clergyman & justices of the Peace within their
respective counties, that purpose as the
Governour, Lieut. Governour, Assistants & Judges
of the Sup. Ct. or one magistrate of the State
having power to act in any other case in the
State shall forfeit & pay the sum of Six Dollars 1 Swift 82 & Sts Con 479.

If a clergyman or magistrate
celebrate a marriage without the previous
he incurs a penalty — but the marriage is
not void Sts Con 479.

Where there is a matter of obscu-
ration, whether a marriage made by two in-
dividuals or parties themselves, and be
valid or not. I have thought, and have
said, but this is contrary to your opinion
there is no such decision in the Eng. Law &
the books are not even silent. The argument
being a contract built upon the Principles
of Law does not seem as of such a nature and
of such solemnity, to render it invalid. see
Ba. Abr. Marriage Vol. 1 Bl 435 no. 439.

At any rate a marriage celebrated by other
than Magistrates mentioned, is considered as void
by the Laws of the State

Impediments
Void or Voidable, & to determine which are voidable
& such void in order must recur to the Impediments
wch. are of three kinds viz Civil & Canonical.

The Canonical are derived from y divine Law &
are consanguinity, affinity & incivility, 1 Bl 434-5
& these are confirmed by St 32 Hen 8. c 38 & 6. &
25 Geo. 2.

These impediments being derived from y divine
Laws they are in Eng cognisable only in the Spir-
itual Courts 1 Bl 434-5.

They are sanctioned by y Eccl. Sts. & especially by the St.
32. Hen 8. the phraseology of wch it is "that mat-
ters of pleas
ers of God's Law & wch shall void marriages, such
as the Levitical degrees, are to be tried &c.

The Levitical degrees are the standard of con-
sanguinity & affinity - what they are within
& the persons are forbidden to marry are fixed
& I need not here observe that the canon-
ical impediments, under the most learned
& able Judges only within y Levit. degrees of the par-
ties, since when one of the parties is dead
no enquiry can be made as to the validity
of marr. by y canonical Law. - y reason is that
the proceedings for annulling it is by y divine
Law, which regards y void of y case - & of a
sentence more than a spiritual discipline
1 Hen 33. 1 Bl 434. 441. Lac 548.

Wch are without
the Levitical degrees, all rules are relate to each

Marriages each other kindreds either by consanguinity or affinity, as a man cannot marry his daughter, grand daughter &c., or by affinity, his sons widow &c. 1 Bl 435 m Bk. 2 Ba 571.

Ordinary collateral kindred most distant which stands degrees as that of Uncle & Niece. Aunt & Nephew. This computation of kindred is by the Civil law in which these persons related in 3d degree, & then all relations not within 3d degree inclusive are allowed to marry, as first cousins, who are related in 4th degree. Now these are relations among collaterals allowed to marry 3 Kent Com. Law Lec. 2 127. 1 Swift 235. Bk 1 191

There has been a great deal of controversy in this & the neighbouring states, on the question whether a man might or might not marry his Brothers widow, these are related by affinity in the 2d degree by marriage & have become a subject of question has been discussed Legislature, Courts & Churches, but we have had the point finally settled by a decision of Ct of Con. 1795. Bk. Jacobs cent.

But this prohibition of marriages within certain degrees, still leaves room for various other relations of the parties, either by the Eng law or legislature, this necessarily is the case, from the rule that no marriage can be made after death of one of the parties. 1 Salk 121. 5 Co Rep 68. 1 Bl. Com 434.

Now on the other hand a marriage within the prohibited degrees is by the Civil & Roman Law

cont

Marriage & and the three usually declared to be legitimate — St Eccl. Law differs from St. Eng. Attainder as to legality of the mart. may be made at any time, even after the death of one of the parties. 2 Roll. Abr. 358. Is here punishable for incest as a temporal offence — In Eng it is cognizable only by the Spiritual Ct. & no Temporal Punishm. thereon to be inflicted for the offence, is that of excommunication, here it is punished very ignominiously — see 2 Lev. 183. 4 Bac Ab. 64. 65. 2 Lev 248. Ca. Law St Eccl. 477.

Civil Contracts

in which, there are 1st Infancy or nonage of one of the parties. 2d Want of age. 3d Want of consent of Parent or Guardian. 4th Want of reason.

There in Judgmt. in Eng. under 7 years void absolutely, so that there is no need of a decree to set it aside. But there are cases not seem to be precisely true as to the 21 year. for as to Marriage it does attend & may be void to all intents, for on coming of age there is no need of a new mart. at common Law on ground that it is only voidable and also when void — see Roll. Just. 2 Bac Abr 135-6.

1st Infancy is a

Just ground for avoiding mart. if one of the parties. In the case of such mart. is not only void, but it may be avoided by a made a stranger. 2 Bac Abr 135. 2 Lev. 183.

2d Want of Age. In case of
coverture may be satisfied when the parties ob-
tain the required age, without a second cele-
nization of the mar.
what on any other hand either of the parties may, & after age may rescind the K mar. without
a decree

The age of consent by C.L. & our own is 14 in m
males & 12 in females 1 Swift 79, 1 BL 436.
And if either of the parties be under that age
& the other of or above it, yet one may dissent
as well as the younger for the obligation to be
living must be mutual & equal

But however where a contr. to marry in future & one of the parties of the age of
the other not, yet one of age may be subject
for a breach of contr. to the other cannot
sue him - if some as in contr. between ad-
ults & infts. & becomes of adult & con-
firmed it stands same as if then made
1 BL 436. n 6th.

3d Want of consent by Parent or Guardian
This is no impediment at C.L. but is made
so by St. & mod is accepted in cases of the mar.
of Minors. Lotts on Dig & statutes, & probably in
every State in Union. 1 BL 433-4.

4th Want of
reason. The mar. of an Idiot or Lunatic is void. for
as they have no legal capacity to make contr. of
any kind, they certainly cannot make one of
this description 1 Rol 357. 1 BL 38.

Impediments to Marriage. Our Law & Equity
are the same in most of the U.S. except in several
respects from the Eng. as regards these impe-
diments — 1st By our Law & Mar. with
an Alien prohibited — degrees is absolutely void. —
4 Kent 79. —

2d Remarriage of parent of Parents or Grandm.
with or w/o consent of the person committing
incest is annulled by law in Eng & U.S. the
mar. is absolutely void 1 Bl 439 &.

The impediment of pre-contr. was never
known to our Law.

There has been some speculation in the
Eng. books, & also in this country, on the quest.
whether a mar. of parties in, originally
Alien, who belonged to another, & went out
of it for the purpose of evading the Law of the
latter — and be valid. Mar. & mat. will be void
if for the contract is executed, but if parties went
there to execute an illegal contract &
contract void, & living in country 2 Bur.
1080. B. N. P. 114. 2 Kent 89. 74. 2. 1 Burn 79. 80 n. —

Annulling of Marriages.

The mode of
annulling marriage is by divorce.

Divorces are of two kinds. 1st a vinculo
matrimonii 2d a mensa et thoro. —
The first is an absolute & total dissolution
of the relation. The 2nd but a partial one

one A does not act at all upon & mar. is
void. 1 Bl. 440. — Has but a ~~one~~ nuncupative

In Eng. a total divorce can be obtained
only for some of ye canonical impedi-
ments & they must have existed before
mar.e — for a supervenient cause it can-
not be obtained — I mean in Ab. of Justice
for ye Legislature may grant divorces in-
for any circumstances 1 Bl. 440.

When a total divorce is granted, & issue
of ye mar.e are illegitimated, for ye decree
by relation annuls ye mar.e ab initio.
1 Inst. 235. 1 Rol. 358. 360.

The causes of divorce
in Eng are incontinency, cruelty &
well grounded fear of both by threats
It is grantd in any of ye spiritual Cts
but of late it has become usual to apply
to Parliament & there obtain a total div-
orce, especially for adultery sup. Moore 683
4 Bl. 141.

In case of a partial divorce ye Wife
retains her dignity & is entitled during
ye discretion of ye Eccl. Judge, & if after the
decree ye Husband refuses to pay it, ye Wife may
maintain an act. for it at C.L.

But if ye Wife elopes & lives in a state of incon-
tinency she forfeits her alimony 1 Lev. 5. 1 Bl.
441. 442.

If she dies after a partial divorce the

Divorce } are presumed to be illegitimate
for } parties are separated by Law & the
command of sch: — unless it be obj.
but presumption may be rebutted,
& rebutted if children are legitimate by
of relation of Husb & Wife cannot be asserted
by } parties after decree Sal 123. 4 T.R 355, 7 T.R 482.
} Ba 311.

But when born after a sch: by agreement are
presumed to be legitimate, & nec ex non-
access this of women may appear. — for } parties
this rule are not required by Law to live
separate Infra 925. Ex. D 1864. 5. Sal 123.

The diff: between case is merely as
to } former case } presumption is
rebutted } latter, in latter divorce absolute
from

In Eccl. Divorce may be granted by
Sent: 1st first for Fraudulent contract
has chiefly respect to inviolable: & consum-
mation both by the Civil Law & Ecl of Eng.
2d for Adultery, 3d for three years wilful
desertion by one party; with a total neg-
lect of duty — And it has been determined
that driving } wife away was equivol-
ent to } years wilful desertion. 4th for
} years absence on Indict &. 5th for a
} years absence on a voyage or by the com-
mon } Sent: & not heard of or heard of con-
trary } Statute & rendered the Sent:

death presumed — But the particular circumstances to attend each case — 2 Bl Com 276 1 Bac — In these and such cases the party is presumed to be dead, as in effect, proof of decease of the Pt. is but declaratory of fact. & that the Jurors attesting it is single

In Eng. there is a similar presumption as it relates to bigamy under 9 Geo 1 Jurors one of the parties has been absent 7 years unheard of, the other (at home) is guilty of the above crime

Eng. in case of a devise for life, if the life man is absent 7 years unheard of, he is considered as dead & the estate terminated 8 Cow 85. 1 Bl. 164.

In all the above cases in Com. of Barbee, (both parties to the suit has been granted) are deemed single & authorized to marry again

Parties divorces are never granted by our Legs. tho' they are sometimes by Legislatures — Shurtliff 193

What divorces in Com. do not affect the legitimacy of the issue before the — are all consummated causes, except that of prov. court. wh of course annuls marriage as void

In Eng, in case of a divorce a vin. mat. the wife has no dower for adultery, the wife does not marry the adulterer, & does not forfeit her dower

Divorces } deceased at his death. 2 RL 190. 133. 197.
5 Co 96. 7 Co 40.

And a partial divorce does not deprive of right of dower except in case of elopement & incontinency — but he who is bound not by the divorce, but by adultery is entitled to dower 7 Co 19 Bro C C 463. 1 Bart 224. 3 Dall 267. 295. 4 Ba 142.

So Con she is entitled to dower even in case of a total divorce if she was not the party to blame. but if she applies for & obtains the divorce, this is by virtue of a St. which enacts further that when she obtains the divorce, the Ct may allow her a reasonable share of the est. not exceeding one half, by way of present alimony Le Con 239. 277. 1 Swift 192.

And by the same St. a woman who is guilty of gross & criminal degrees — it is said — of course the issue of it illegitimate, but still the Ct may allow & decree a reasonable share of her husbands estate not exceeding one half —

Finis

A bond is given to trust? A wife during coverture dies & survive to the trust? Does? I answer to the first question I shall not the reason when, for the further of proof lies to shew to whom it survive If a sum is bequeathed & given to A for life & at his decease to the trust? immediately A. a bond has been considered as a legacy; so the Ct has as it has been determined

may rest upon it alone. The later opinions on this subject appear to be that the land belongs to the husband unless he has assented to the wife's entering, as the owner part lies in her the wife in her right. It does not survive, — but this is a practical case, & it will be of little consequence whether this or the contrary opinion is right if it were but settled. see Brod & Bing, ca 12.

Parent & Child. & Guardian & Ward.

or

Infancy & Age

This Title relates principaly to the rights & priviledges & disabilities of Infants.

By the C.L. & Eng. & of g^t^ country an Infant is any person male or female under the age of twenty one years. 1 Bl 463. Litre 104. 259.

This alone byt by the Rom. Law. that there has prevaild a singular one that females at any age at eighteen years had its origin from y^e^ consideration of their own privy children until that age — but it is not Law.

By the Rom. Law. full age is completed on the day preceding the Anniversary of one's birth, & as there is no fraction of a day he is of age the first moment of y^e^ day — Thus if one was born the first day of Jan^y^ 1800. he will be of age the 31^st^ Dec^r^ 1820 & on y^e^ first moment of y^e^ day. so that he is of full age within twenty four hours nearly before the expiring one. Salk. 625. 2. Ray 980. 1095. Rym. D 144. 686. Ray 84. —

By the Civil Law. which was formerly to be pursued in y^e^ Ecclesiastical Courts full age is not completed till 25. Dav. 118.

Privileges & Disabilities of Infants.

as to

Crimes. Civil Torts, & Contracts involving this caption for certain other transactions of a miscellaneous nature

I. As to the

Crimes of Infts. No person is punishable by ye Laws of Eng or our own for any capitall offence under ye age of 7 years. — for it is a max. of law, "Doli incapax", but a Minor under ye age of 7 is presumed to have no Will & ye presumption cannot be rebutted, 4 Bl. 22. 23.

at ye age of fourteen ye Infts becomes capable of committing crimes & is punishable for them, & he may be punished capitally 1 Bl 464. 4 id 22. 1 Hale 25. 1 Hawk. 1.

Between ye ages of seven & fourteen, an Inft is punishable if found doli capax, that is, capable of discriminating in legal judgt between good & evil — which is a point of fact to be proved.

It has been said in some of ye books, that from 7 to 10 the presumption is in favour of ye Inft & after ye age it is a ptt time, but the idea is now exploded, & the presumption is now in favour of ye Inft until it is proved ye contra likewise on ye former 1 Hale 20. 25. 634. 1 Hawk 1. & Bl 464. 2 id 22-3.

Indeed there are many cases in which Prisoners under the age of 14 are exempted from punishment for unnecessary accidents & Omissions not expressed. But there is no general rule governing them & Children may be found responsible upon examination to the nature & consequences of particular conduct. 1 Hale P.C. 22. 3 Ba 130. 4 Bl. 22.

But it is a constant rule of practice at the Crim. Ct. that an Infant is not to stand convicted upon his own confession, without corroborative circumstances, for an Infant of any age is supposed to want discretion, & even that to discover his meaning false confessions — 2 Ld Raym. 1466. Foster J.

The Presumption in favour of Infants under 7 years of age can in no case be rebutted; & the Prisoner will never be allowed to prove them Idiots Hawk. P.C. Vol. 223-4, Foster 439. 1 Bl 464. 4 Bl 23.

Generally speaking, the instituting corporal punishments, sometimes include pecuniary ones not when not named — The general rule appears to be one of mere construction, the Rule appears to be, that if the offence are created by Statute made such, as is commonly punished at C.L. the Punishments not named shall be included, as making Battery a Felony —

But if the offence created by the Statute

Crimes of Theft } made such as civil wrongs liable at
C. L. by a criminal prosecution. Crimes of mere
Theft are not included. Crimes of Theft are not
crimes per se by the act forbidding only & not
committed by any named. & the offence
not being [illegible] enforcing at C.L.
Burrill. Those cases of the remaining crimes
[illegible] 2 Hale P.C. 182. 3 Ba. 131. 1 Russ
[illegible] 1 Hawk. 1 Chy. P.C. 4th Edw. 264.

Civil Liability
of Infants for Torts, or their civil injuries, for
these they are generally held liable at any
age. What of torts committed by force
& arms & which relate to the person. Infancy does
not excuse the penalty of a libel; slander;
of battery; assault & battery; false imprisonment
& wounding. These torts do not require
any malice or intent. Nor is any
proof of malice necessary to be given in order
to recover damages for a tort committed by
an infant. It has been determined that an infant
is liable civiliter for a trespass for
the only question is, whether the acts caused
the injury complained of, or the natural &
probable effect of. An infant of 4 years old
was held liable for putting out another's eye.
Indeed an infant of any age is liable for an injury
by a wrongful act by force. The true common
sense rule now prevailed among the profession
is that an infant is liable for a tort
committed by him, which did not
require that C. should join him, the act be done
in company with C. 1 Hawk. P. C. 5th Ed. 3 Bac. Abr. 690.

Term of Aug. 13

There seems to have been an opinion prevailing to some extent, if an Infant commit a tort for Slander under 17 years of age, but I cannot see reason for the opinion, it is founded on a case in which an Action of Ass was held to lie, but that does not prove he can't be held liable under that age, the truth is he is liable whenever he is actuated by a malicious motive (vide supra), but he must be sued as for a tort of the nature of the act.

2. The Jury are to be told that an Infant of this age is as much liable for Slander as any other person, but the contra must be found but if malice is proved the verdict will be for the Plaintiff. 2 Bac. Abr. 532.

3. The Infant is liable to be punished as a Common Barrator under the age of 14 but the presumption is in his favour after that age the presumption is against him, & this want of age is no objection to the presumption may be rebutted. 2 Bac Abr 532. 1 Lev 129. 2 Sid 58. 1 Hawk P.C. Rule 1 p. 73. 913. 913.

It has been said there can be no libel but a fraud or deceit but the doctrine has been disapproved by Lord Mansfield & very strongly by Lord Eldon, who observes, that the distinction of Lord Hale cannot be [illegible]

York & Ptff. says that a suffrance a Bailee by
Recovery
a deft to a Bailment to recover money from the
Master or who contains an Attornm to shew
him out of it he shd be subject. as Lutwam
fuel's opinion in Bur 1502. Mod. R 223.

Obn as to
being made to sound in Tort cannot be maintained
in Indebitatus on Ptff when cause of act in fact arises
out of a Contt. for this wd be to render him liable
on his contt wh the Law will not allow. &
he shall not be subjected by a mere trick of
Pleading as is making y act sound in Tort. Lo
is an act for hiring & abusing an horse sounds
to sound in tort, was not maintained; for it
was but a breach of trust on his implied contract
& one another case, as Bailee, & for y reason an
act not to be sustained by y Laws of Eng. 2 Ld R 995.

Obn as to
is a loose dictum attributed to Justices Parker & Powys, that if a person states upon
himself to trade & act as if of age, he wd be liable
on his contt - & not allowed to shew his
Infancy. — But this is not Law. 2 Wms 203.

There are some
even some cases in wh Ct will enforce a
contt agt an Inft to prevent fraud. — There
no Practice nec laid down, to ascertain this
Dep of cases - but it is left to Courts Discretion in Equity
Salome however for y Present (for y subject does
not belong here) the Ld Chancellor of Eng.

Eng. is considered as the paramount Guardian of all the Infts in y^e Kingdom — & has the authority as Guardian than Judge — & the interposition is an effectual relief agt. fraud thro' y^e medium of a Court of equity proceeding. 1 Bro. P.C. 91 — 1. 9 Mod 39. 2 Eq. Ca. Abr 529. 1 Ves. & Beam 353. 358. —

3^d & last Infants Contracts

in dealing, Bargaining for certain other transactions of a Miscellaneous nature.

1^st Infant by Prochein Amy or Guardian for certain different acts at different ages as for choosing guardians the age is 14 both in male & female — Bac. Abr. Infts. at 12. Guardian in 14. Females at 12. 1 Rol. 468. Sh. Com. 88.

An Infant of any age may be an Exec^r but he cant act as Ex^r so as to bind himself until 17 years of age — & in the mean time there must be an Adm^r appointed durante minore ætate cum testamento annexo, & all the Infts remaining undone by y^e Adm^r when Ex^r comes of y^e age of 17, the Ex^r must finish & the power of y^e Adm^r ceases. — The Infts. of y^e will is said to be that at 17, the Ex^r can himself make a Will, & a man may be an Ex^r when he himself can make a Will — But I consider it as merely arbitrary & for a person can make a Will at a much earlier age y^n 17. & to a 9. Off. Exec^r 317. Dal 39. 1 Vol 250. 3 Ba 121.

But no person can be Adm^r un^{til} he attains full age — For Adm^n cannot by Ex^r

Statute of E. L. give bonds for ye faithful execution of the trust. Except Executor, he be such as one entitled age 2 Bro. Ecclesiastical Law 492. 493. 2 Mod 295.

Infant Executor as well as Adult are compelled to give bonds, or ye executor dies intestate they are not entitled till full age. 2 Atkyns 26 B.

The age of consent to a Marriage by ye Ld is 14 in Males & 12 in Females. but as by the above? if parties is under age of consent & the attainment, either may on the younger coming of ye age disagree & marry ye contract mutual dissentient 1 Bl 436. 463. 1 Inst 79. Salk 394.

A female divorced a vinculo at ye suit of the husband or if husband dying ye age of 9 years, she is entitled to dower. 2 Inst 435. 2 Roll Ab. 146 B.

The age of discretion for pleading & all as C.L. by some civilians 14 in Males & 12 in Females for Appeals of Death, & mayhem & other acc. ibid 15. 17 & 18, but some others to be ye same age by ye preceding opinions for ye ye Civil Canonists, not regulate these matters in Eng., they being cognizable in the Spiritual Ct. — It is a little singular that no person can be settled 1 Inst 78. 2 Bac Ab 469. 2 Ch 11. 1 Bl 463. 2 Ld 469.

Age of Action ye age in both sexes 17. 25 Car. 42.

But ye general Rule is that no person can bind himself

Infant can't be bound by contract unless it be for necessary of things, & in the case mentioned he may disaffirm & sue for the money.

L. Pl. Contract

of Infant unless for necessaries voidable & pay Lord Mt Com 465

If an Infant & an Adult join in a contract nie nie & Adult is bound, tho' Infant not. Doug 380. 2 Bl. 1091. 1 Bott 58.

So on the other hand if an Adult contract with an Infant & former is bound tho' latter not for privilege of infancy is personal, & the other party (Adult) can take no advantage of Infants privilege — case of adult selling Infant an horse. The contract being void all round 1 Pow. C. 94. 1 Mod 285. Bac. Ab 92. 1 Wms 54. Str. 937.

The Rule a fortiori in Equity of adult contracts with an infant a case requiring a specific performance. But if the Ch having discretionary power as to the interpretation of terms, it will never allow of Infant to be cheated by means of his privilege 9 Ves. 393. 1 Pow. C. 39. 47.

But the rule does not hold when of contract Infant is doubtful, but only when it is void at law & in Eq as well, & so case may be, for when it is strictly evil, there can be no consideration — If adult not bound, because of Infant not bound, but from want of consideration — & the Ch as Legal effect of Infants

Contingent Remainder } Infancy, as if a man
who promises an Inft. to do certain acts if he
shall attain such age, shall be bound to pay him
damages if he fail. Thomas
Moore to allegd to act, — for a promise of a thing made
by an Infant is absolutely void. 1 Str 934. Bac Ab Infancy.

If on a mutt
between an adult & an Infant & Infant has received
the consideration, & and afterwards avoids the engage-
ment, it is said he is not liable to refund what
he has received, but it shall be considered as a
gift to him. 1 Salk 279. 1 Ld Ray 169. 1 Bulst 209. 212.
How far gifts may be subject to qualifications
or whether subject to any qualifications at all
we do not find in the books. But it seems as if
there were such valuable cases in wh the Infant
who disaffirms his engagemt. shd be compelled
to refund. wether the article he rec'd remains
in his hands specifically — if adult had done
in principle recover in trover agt Infant. — Case
of selling Infant horse, & he plead infancy there
is no difficulty on principle in compelling a resti-
tution. This however will not hold univer-
sally, as in case of money given Infant & he
had expended it in dissipation, he cd not be
liable, for if he was he might be compelled to
raise it agst out of his own estate. Tho
Law will not allow. — This however is mere
speculation, & there is no decision upon the point
1 Bl 466. 1 Burr 472. 1 Bos 929. Cro Jas 494. 2 Term
6 5 95

Ag[t] Cont[a] and &c.] Ob[n]. It is a gen[l] Rule that an Ag[t] is not liable on his cont[t] while for nec[ss] under some circumstances he may be liable The descriped article of g[d] Law nec[ss] are Food. Apparel Lodging. Washing, Medic[e] & medical attendance & Instruction. Vide 456. Stark 82. 1 Rol 9. Cro. J. 494. & B. 636.

But an Ag[t] is not in all cases bound for the articles, for he is not bound unless they were the articles wh[ch] g[d] Law deems nec[ss] & also nec[ss] for him at g[t] time of taking them. For it is not to be understood, g[t] because cloths are nec[ss] g[t] he can bind himself for cloths at any time Cro E 578. Cro J 560. Salk 15[1]. Palm 67.

And g[t] great nicety in any given case g[t] articles were or were not nec[ss] for g[t] Inf[t] at g[t] time of taking them, is a quest. of fact to go to g[t] Jury. Where in an act on Cont[t] to wh Inf[t] is plead a gen[l] Rep[t] g[t] nec[ss] or neglect without specifying g[t] articles is good, it not being a question of Law. Lilly 170[1]. Cro. E. 583. Cart. 170-1. 1 Ventr 65. & R 576. Cro J 565.

And on g[t] same Prin. on wh he may bind himself for his own nec[ss] he may bind himself for nec[ss] for the Wife & Children, for as he can not contract against made g[t] Husband & Wife cannot discharge made g[t] nec[ss]. cont[t] relative one to g[t] other

relation formed by d. Jenk. Chr. 158. Cah. 2. 161. 9 Co. 135.

An Indt. ag. is found Deft. inters for 9 £18 Due from the Wife dum sola & then 2 mi diff. whether the debts were for necess. rem. of the wife at death of intestate, it matter, the State her own one Bond. Dolo. 95.

But an Indt. of recogn. 9 Care of Lunacy, Guard. or Master, and bind himself even for necess. of Parties. Is provided for for 9 object of 9 Law is to prevent his suffering & the end accomplished, his Power ceases 2 Bl. R. 1026. 2 W. R. 85. Park R. 209.

Case when an Indt. of this nature of Bond &c, May give Spl. proof for their the case must be a very strong one & is must be very clear that he was not provided for, before 9 Ct. will allow him to be heard by this court. for necess. even, for 9 Law will not allow 9 Jury to interfere with 9 relation of Parent & Child as it might effect 9 Parent in matters of

The only case in wh. 9 Def. can bind himself by Indt. are these, 1st When he has not been Guard. or Master. 2d When having them, he is only Guard of that case 3d When under the care & not duly provided for.

But.

[illegible] But in ye two last cases ye Parents &c. is also bound, for Parents are bound to maintain their children, but Guardians are not, & with Regard to Infants upon ye contr. whether he is or not. & this Immunition given ye Infant to bind himself is not intended to discharge ye Parent, but only to relieve ye child. 1 Bl 446.

We have a St in Com. providing, that when an Infant is bound by his Parent he cannot contract. the Parent is bound by them & ye Infant is not. This however does not vary ye Rule as to Infants power to bind himself for necessaries & so far as ye St relates to this exception it does not alter it does not refer to Infants power to [illegible] 1 Bl Com. 440. Bro Ab Infancy 54. 25 H. 6 Day 57. If from ye circumstances of ye Infant we cannot collect him to contract at C.L. Note it here may be done notwithstanding the St. for it is not to be supposed that ye object of ye Legislature was to deprive ye Infant of power of pledging his own credit. if he has any for necessaries in ye cases above

But ye St in one instance does invest a new power, it gives power to ye Infant to bind his Parent Guardian &c by contracts made in his own name. if ye Parent &c allow him to make contracts. This was decided in a case wherein ye Father and Infant Son were trading into Partnership, ye Company failed & ye Father

Father was held liable for all the Comp. debts — a
deed there are many very hard decisions under
this rule — It does not go as far as this case
however as Defft is not bound on his express
contract as Ex. even for necesss — for when he
purchases necesss on his own credit he is
liable only for the reasonable value of the goods
& extent of his engagements. It is then clear
that his liability in these cases is founded
on a contract implied by Law, & not on his
own, that his express contract to pay 100. for
necesss is not but 50. — he is liable to
[illegible] 50. [illegible] and he liable for
$100. Cro C. 559. Cro J 660. Poph 151. 1 Rol 429 —
2 Salk 159.

As to what Words in such an Indt may bind
himself for necesss, there are some distinctions
to be observed. The true prin. why he is bound
only on those contracts which have a reasonable object
arguing — A pro was I should not go on the ground
of distinction here, but as more certain
& easy

1st It is an agreed point that an Infts contracts
are void by a plead Law. Cro E 911. 1 Roll R 54
Cro Eliz 154.

2d By a Single Bill i.e. a bond without a pen-
alty, he may bind himself, & acc. Dha 939.
1 Lev 86. Whit. B. 20. 1 Mod 416. 3 Mod. 423.

3d By a Negotiable Note entirely negatived

Infants Contr.] he is not liable in favour of
Creditor 1 Str. 41. 1 Salk. 93.

4th By a Note not negotiable or if indeed
not negotiable he may be bound for necess.
Contr. 150. 1 Salk. 93. 1 Show. 324. 5. 1 Wooddes. 193.

5th By a Bill of Exchange it seems he may
be bound if it is not negotiable, but it seems
he is not liable in favour of Bona fide
Ind. 1 Salk. 93. Chit. 320. & 28.

6th And lastly by an account stated he is
not bound even for necess. 1 Burr. 172. 1 Bl.
40. Lat. 169 Bay 87. 3 Ba. 134.

These are the distinctions as to the form by which
an Infant may or may not bind himself by
writing. The nature of the distinctions are

1st As to a Penal Bond it is admitted
that he is not bound by it, for it is not
plainly meant to be to his advantage and
cannot be to his advantage but this proves
by the 2d question whether it is void or only voidable
Reason is, that the mind cannot be
joined into. And if he is bound at all he must
be for the whole amount of the Bond 1 Show 6. 3 6. Chit
Bills 20. 21. As to the reason of it's disadvantageous
see it in 1 Burr. 172a. Cas. E. 920.

2d Query here arise in case of an Infant having given
a Penal Bond for necess. This is whether he remain
liable upon the original simple contract, in assumpsit
upon the quantum valebant for the value of the
goods. If he stands upon the question whether

Infants bonds &c. Whether the bond merges the debt
contract & that depends upon the question whether
bond was void or voidable — void as to the con-
sideration, not to the thing. There is much dispute
in the books upon the question. See decisions Finch
Abridg & Moor Rep ca 13.

2dly By a single bill the creditor can bind himself
— but the consideration of a single bill cannot, now
but formerly this consideration was examinable — where
cause of action Rich 382. 416. 423. 1 Lev 86. Whit 820.

But in one of the cases quoted from Keilw it is said
that if an Infant gives a single bill the consideration can be
enquired into, & if this is not true & proved that
such bill cannot bind him, — there is no note
on decision upon the point — 1 R 46.

In case of a single bill being given by an Infant it
is voidable, that the consideration cannot be enquired
into for if given for necessaries it binds him, if not given for
necessaries it is only avoidable — & so there cannot
be charged upon the simple contract. B. R. Pl 56. Bro
C. 216 Esp D. 164.

3dly With a Bond & Bill. Where a Bond is given
stated, it is settled the consideration cannot be enquired into
so in an action by Indorsee — as the Infant not
subject to Indorsee on such Notes, But if the Note
be stated, the consideration may be enquired
into. & the Infant is bound by it.

Bl. Com. — Bill of Exchange attended with many peculiar
customs, as the Bill, & the Protest, & acceptance
&c. Kitch 2. 195. Whit 2. p. 5. 8. 10. Doug 284. 1 Burr
95.

English Law Cases } 1 Ventris. 1 Show. 345. 341. 2 Jon. 71–
1 Lev. 1 Mod. Cas. &c. 216.

If the Lyon recd. [illegible] in Ct. is not bound
i.e. on what is call'd an acct. of Equitable Comfn. to
a Jet. inquire into the reason of ye rule &
if items of an acct. stat. d. not be examined
if they are not reasonable &c. which
is contended the reason has ceased. Latch
[illegible] 1 Ventris 73. 1 Show 42. The true reason
is, because the taking of the accounts is the only consideration in this action.
M. Lon. Hist.

has been a course of decisions upon acct.
stat. d. on simple contracts peculiarly
– One case determined to be that void debt
in another to be absolutely void & in another
that a court of equity would relieve.

For Money Lent

Def. t. never talk'd with Pl. t. or
ask'd him out in money &c. Lent he
found, and he Lender himself laid out
money for ye merch.s for ye contr. must be good at
first or not at all, & cant be made good by
after & subsequent facts, as by laying out ye money at
ye merch.s at some future day. But if the
Lender himself lays out ye Money he then
stands in ye place of ye Vendee & may recover
as ye owner of ye value of ye goods. For
then as Pl. t. is entitled at all at Law
for money to be given, but only as for merch.s
furnished him for Sent.r purchase of goods of
a 3.d person. & then the owner calls them to

Comyns Dig. Pl. 2 P. 2 S. 5 Mod 3 B. 10 2 Ld Raym 1 Bl.

But in Equity a Deft is bound of the
money bound in notary Bond and on
Oath given by himself for equity can
enforce a continuance as it affects the Lender
Caire & not the Deft — Interest money can
be had there only by grant of the Penalty
&c. The difference between money Law &
Equity is that at Law a Lender cannot say
out his money for a certain time himself or Deft
will not be liable, but he is liable in Eq.
as any rate of the money was refused for more
1 Atk 552. 2 Eq. Ca. Abr. 516. 1 Bow C. 37. ———

Nor can Deft
is not bound on this contract for a time
unless his Bond & Mortgage are a kind of
mesne — & if he be a Mechanic — for Law
will not entrust a Deft a discretionary
power 2 Atk. Sel 279. 1 Ball & B. 1 Ves 396

Nor is he
bound on Covt to pay for repairs to the Premises
however mesne this may be for this interest
it is not mesne a covt as Law allows an
Action to make — it is not immediately mesne ad
victum et vestitum. But it is presumed the Grantor
will take of them. 2 Lee 196. 1 Bow C. 36.

Where two seised
Power Mortg in Deft take a Lease of a Grantor
or of Land & holds it until ejected by the remainder
being unreasonable he is bound to pay it

Sect. 3 I dont know upon what grn. this is founded, for this case do not come near to ye rule mentd. upon many other article which ought to be mentioned — I can ye[s] I know it may be said this is to provide for ye[s] giving, but the case cited of ye Lord Cro. J. 520. & Bulst. 3 J. Poul. 35.

Who been determined yt an Infr. cant bind himself to pay for instruction in Musick & Dancing & such like accomplishments. it not being a kind of instruction ye Law allows necessary. This decision was had in ye time of Car. 2d., but I doubt whether ye same wd hold now, with ye[s] notions of a certain rank & degree in life, — there is no modern case deciding it. & ye Court will be very careful in extending ye rule Ld. Raym. 556. 1 Salk. 386.

All these cases come within ye gen[l]. Rule that a Infr. is not bound on any of his contr[s] unless for necessary[s]

But if he voluntarily does what he is compellable to do either at Law or Equity he is bound by it as in case of his making a partition of a tenem[t]. in com[n]. or ye like case. So also if a Lease is transmitted to him by Descent, Gift or grant & he stays upon it he can never avoid it back again — for then he receives a Lease made by a proper person — It is different from ye case of a Lease made by himself — So also if Lessee assigns over to a Stranger — he may

So a Pt. of the having received y[e] interest of a Mortge from another, releases the Pt. to Mortgr. or Assignt. of y[e] debt. — For in all these cases [illegible] and 4 Ann 3. Burr 1794. 1801-2. 1 Swan 172a. 315a. 3 Co 85. 1 Bl R 575. 4 Cruise 215. —

This is perhaps y[e] only class of cases in which an Incumbrance is bound at Law, by the acts & acts of Mortgagee

In Eqy. in addition to 62. rule or Bar in such cases (perhaps common to all) that if an Eqy. receives a Mortge from another the payment & receiving y[e] debt may make a valid conveyance of y[e] estate mortgaged, and a title taken to allows y[e] Pt. or Admr. of y[e] orig[l] Mortgee to do y[e] same thing Sty Eqy. 226. 1 Ba. Ab. 199, 164. 2 Swan 138 Common is that in such case y[e] Pt. his Guard. or Admr of orig[l] Mortgee may make a valid conveyance of the estate mortgaged.

An Infant Deft is bound by a decree of Ct except that he is allowed 6 months after coming of age to vacate y[e] decree by shewing fraud or error if there any, & if there is none or none can be shewn, he is bound 2 Vern 342. 449 1 ib 295. 2 Vent 351. 1 Salk 304. 2 ib 401. 3 ib 352. 1 Ca Ch 626. 1 Forrec 75-6.

And an Infant Offr is as much bound by a decree of Ct as an Adult unless he can shew fraud or gross misconduct in the proceedings or [illegible]

Infts Contrs 3 mod Evid 3 Atk 625. 1 Ball 75.

Infts such acts of an Inft as do not affect his interest, but take effect from an act he has a right to exercise, are binding, as, he may execute a power &c with it as to turn to land which for him no privilege of this is in danger, he only acts as agent. And discretion is much to be seen being special.

Infts of an Inft Exrs pay receive or release debts after 17 years of age, he is bound, this not presumes all fraud to be want of Infts execution

Infts of the acts in generaline of any ministerial power who likes a right to exercise by law - those acts are binding 3 Burr 1802

If he marries a Feme after full age to pay a contr. made before he was of age that promise is bind. tho' it was not for necess. ... the rule holds however only of those contrs which are merely voidable, for if strictly void, it is wholly inexcepable of ratification 2 BR 966. 7 Ves 648. - 1 Atk 6 91. 2 Vern 203. 1 Ball 131-2. Cas. t. 163.

And of whether an Inft he had given a Libation Security - not is absolutely void, a Feme, by Infts made after full age will bind him; - not however upon the ... security for that is not contracted by Infts from

promise Lies upon y plaint. proved on
y mgt. bond contract still remains a suffit.
consideration for y promise. the pay. having
been delivered Doct. 3 Bl. 153. Esp. 164. 3 Bos & Pul. 136.

Quest. if y writ. security had been but voidable
for a mine. Qu. y rule wd have been different
i.e. the promise wd not have been binding
for y mgt simple (or bond) contr. wd have been
merged in y writ. security & it being but void-
able) has wd not remain as a consid. for y
subsequent parol promise 3 B. & Pul. 136. Esp.
Dig. 1 Roots 58. The books say y latter promise
wd not bind, they ought to say it wd ratify y mgt
security, wch is promising y same thing
In y latter case y act. shd be brot on y mgt prom-
ise, & to the plea of mgt. the repl. of a new prom-
ise wd be good. The case relied to was where an Infte
rec. a bond & bond & gave a single bill for y
money & after full age made a promise to pay
y debt. Qu. opinion y y simple contr. was merged
in y mgt bill, & did not remain to support a
subsequent promise. Qu. Doubt. Think that if
y writ. had been void on y Bond - it being void-
able - it wd have been supported - as alle-
ged by y subsequent promise —

When person
y Infant makes a new promise after full age he is
bound only to y extent of y promise thus if
he had promised to pay 20 £ on y mgt bond
he wd be obliged to pay the 20 £ for y first

Infts Contrs } Plea of 4 Years. is an 4 & 5 Ann. c. 16 gives this defence of limitations, Exp D 184

Plea of Lapse of 3 Yrs

Depl. of a Prom. after full age is respected as for an Infts is obliged to prove by some evidence of a ratif. Prom.se - & he need not prove Defts was of full age at time of making of subsq. promise - for if pleas completion - that he was of full age - & so was pro. & if omits pleads as Defts - 2 Bla 796. Ex D 184. 2 Bla 1128 n. 1.

When an Infts is sued on a cause of act. wh a plea of infs is a good defence, the contr. is changed in a sum. way, but is left to plead his priviledge. If a Wife is sued for a cause of act. wh contr. is a good defence we have seen she can be sued in a sum. way - & reason is that her incapacity is total, - not so with Infts 1 Ex. 4 Burr 1960.

What Contrs of Infants are void & what only voidable.

It follows

you will perceive from y rules given, y as to contrs made by infs except for necess are in valid - they are either void or voidable.

A promise that is of matter in deed construe there contr as voidable than void 1 Burr 566. 2 Bla 1803. 2 Bla 998. 3 Bla 182 n. this construction when Statute intended is gen. advantageous to y Infts - tho once it was thought y promise absolutely that priviledge was construed

contend, the more advantageous terms to the Infant, but it is not so for here he has an election & chooses of opposites from taking any advantage of the invalidity of the contract

The 1st Good Rule upon the first inquiry when these contracts are void & when voidable is, That those contracts of Infants or conveyances which are of any apparent benefit or emolument to the Infant himself are only voidable - but where they are of a mere speculative nature & apparent benefit to him, they are void. Co Co 50 a. 8 Mod 310. 1 Roll Ab 730. 1 Saund 58. 2 Ld Ray 871. 3 Ba Ab 135. 145. This is the true branch of the rule - I very much doubt the generality of its application, - but the books are, there is on the subject a vast deal of contradictions in the books - & the true criterion or rule of distinction is not settled. This is the true branch Infancy will lead to some results. As regards purchases. Leases, &c. made to him 1 Salk. 279. 2 Vern 608. they are voidable

An instance of this is of an Infant gives a power of attorney to another to convey his estate & he does convey in the Infant's name it is only voidable 3 Bac Ab 613. 1 Roll Ab 730. 2 Ba Ab 135.

Hence also an Indenture made by an Infant as to serve a Master is held voidable only, for it will at least benefit his education & may also be his emancipation 2 Ld Ray 871

But on the other hand it has been said, that a lease made by an Infant

Lord to sue } Trust without reserving rent, or at
least a very inadequate one — this void known 8
2 Lev 210. Dougl 339. 1 Bac Abr 402. Hayg 39. 3 Ba 127. 304.

It is very obvious that y rule as applied to
practice must be a very inconvenient one, for
it seems to be y[e] duty of y[e] Lessee in order to secure
it to sue the Lessor in order to determine
whether y[e] rent is reserved. The cases on this
point are very contradictory, but it is a little strange
there has never been a judicial determination
upon y[e] point notwithstanding the frequency
with which it has been mentioned 2 Burr 1008.
3 Ba 127. 304. There are some very au-
thoritative opinions agt. y[e] rule they are those
of Littleton. Coke & Mansfield &c. Litt sec 5 47.
1 Inst 47 b. 318. 1 Lev 6. Moore pl. 300 a 304. 5 id 335 pl 20
all which not only void all without relation to
y[e] rent. But L[d] Mansfield has not only
denied y[e] rule as applicable to leases, but
has disproved it demonstrably — for in Pl[d]
Hard it is a matter of com[n] experience for an
Ejectment B made a lease without reserving rent
for y[e] purpose of proving B an ejectment by
his title. cog[t] A whose declaration is, that
B on &c. at &c. made a lease to C for &c. on &c.
by which lease C entered, and was ousted by A
&c. on &c. B may prove a lease made by him
before the day laid in the declaration, and
before C could be of full age, and thereby
defeat the recovery of the whole rent, and
make the plaintiff and the indenture, void

however that good consideration & the
nature of the particular case, Rooke J & just ob-
tain distinctions 3 Burr 1794. 1606. 1 Bow & Pul 38.
1 Bl. R 573. 1 Esp 74. 2 Bl R 1161. And it is an ad-
ditional argument that good consideration
cannot further be the case, but that
allow is not absolutely decisive for there is one
case in wh it will not avail, but it cer-
tainly is a good evidence in favor of the kind -
Cowp 854. 10 Co 43. 5 Ves 119.

It has been said that a Penal Bond
given by a Bkpt is absolutely void for it is "for no
benefit or remittance of benefit to him". I have given
for your discussion - see Jg's opinion Bnot Rep. Pa 13 /
but see Jones Mol 249. Co E 92 b. Hut 100. 3 Mod 134.
5 Ves 334. 1 Bow & Pul 54. 62 b. 2 Bl 1184. How can Bkpt & Surety be
treated as contra 3 Burr 1804 & Lit Rep 269. 1 Burr
194. Co L. sec 12. 154 Wood 403. vid. fin. Ass.

It is argued that the
an Bkpt cannot support & this of moral fairness
by Analogy of Bkpt - but it is rather more favorable
Sale 279. 5 Co 119. 2 Ray 815. 2 Burr 849.

If an Bkpt has given
a Penal Bond when requisite he ought to
secure his creditors, & should order the
Ch of Ex to Debt 1 Esp 74. 1 Bow & Pul 38. 1 Wood &
106. 1 Ves 2 Ves 2.

The first branch of the question for
determining whether bonds of Bkpt are void & interested
relates more particularly to securities made

Contract void Avoidable } made by him. It often happens
& the rule relates chiefly to sales conveyances Leases
& obligations made by him. But in this
class of cases there is another rule of the Law of
Affirmable & Avoidable & that is where the
one, is voidable & the other Void. Your Hon. will
a.
perceive, that
gifts, grants, sales, Deeds, & obligations made
by an Inft. such do not take effect by manual Delivery are void. But those which do take
effect by manual Delivery are but voidable
& the great criterion given in Perkins 12 &
14. Litt. sec 249 & Dyer 19 b. 6. Coke 11. 27 a. 30 a. 130

Now a Deed made by an Infant is compleatly
only voidable for him the instant it is passed by livery
of seisin, or in other words the contt. take effect
by the actual Delivery. All & said the reason
of its being but voidable & the great advantage
of the Infant. But the true reason & wherefore
it does not take effect from the livery of seisin. Perkins sec 259. 4 Co 123. & Co 44. 3 Dyer 280 b. 1 Inst 231 a 380.

So if an Infant sells a specific chattel as a
horse & delivers him to the purchaser the
contt is only voidable, but if he merely
makes a contt to sell & does not deliver
& the purchaser takes, in pursuance of the
contt. without delivery he is a trespasser for
the contt is void. If he had delivered & chattel
he could never it by any consideration, or by a deed under
seal. — Here your Honour & during

deeds ~~defeasance~~ upon whether they are already delivered or not. Perk sec 12. 19. 86. 87. 1 Roll 731. Latch 10. 1 Rolle 778.

The words "which take effect by delivery" are an essential part of the last rule of distinction, & are as essential to deeds, as to chattels void, by Bract. & they of course make a diff. between those deeds wh convey an immediate interest & those wh merely delegate a power & first are irrevocable, the latter not. So of leases grants &c by an Bp. or regularly avoidable only for ye interest under their power & take effect by ye delivery of ye instrument Perk sec 12. Latch 259. 2 Co 72. Shep 60. 5 Co 119. Hence if an Bp. delivers a deed to convey, & after shall by deliveries & agr. of ye deed deliver the same to other effect than that of a ratification to the first delivery, having some interest in it. But with a sole covt. this & diff. further deeds are absolutely void, & no interest at all passes thereby till by ye delivery of the covenant terminates. Perk sec 84. 5 Co 119. 1 Rep. 99. Shep 60.

One as to ye latter branch of ye rule, Deeds wh do not take effect from delivery are void, thus a power of attorney given by an Bp. is void, as if an Bp. gives a power of attorney to B. to convey his inheritance to B. B conveys & executes it, & may then immediately sue & as a stranger.

Please turn to article

to avoid &c. } examples, together viz of deed & Power of attys fully explained — the one takes effect by delivery the other does not. 2 Bac 554. 1 Co 8. 2 Roll. Rep 130. 1 Bl. R. 519. 3. 14. Bl 75. 1 Vern 536.

And lastly observe, that a power of attny by an Exr. to convey is a trust void. for this is an act merely introductory to a purchase it is not all inconsistent with the nature of a trust nor does it come within it — in regard to purchase & the latter sentence does not at all regard purchases, but only sales by Exrs. 1 Vol 230. 3 Ba 156. 3 Bur 1608.

Mr Powell. I am aware Denies the existence of the distinctions, & proves the former rule, that rule it is true is supported by many decisions down to the latter & by decisions of high authority but both these rules or distinctions are from a positive nature & ought to be immaterial & not have adopted if it was suggested, as they have had many & pernicious results, but are contradictory Rose 692-93.

Now after all I must confess the true Law under the head is contained in the first branch of the first rule, which relates to the nature of the Exrs. title & in the second rule which relates to the validity & result of such title, that purchases by an Exr. are voidable — that is agreed — & may be avoided for on the first ground that purchases are always deemed advantageous, and as to Exrs. such are not

import to bind him or to divest him of his interest, the first rule is extremely vague & leaves too much to y discretion of y Ct. & compells a [illegible] evidence [illegible] — The rule does not seem to have to be supported by y best authy & certainly not by y dec[illegible] and Ld Ch. J. Pratt's rule to be as laid down by Perkins. & adopted by Ld Mansfield "that if y countermand is intended by delivery, it is voidable, but if no intention appear, but a power merely, passes by y delivery it is void."

Lord Mansfield, in y case of Bunch vs Simons 3 Burr 1794) qualifies y latter rule & states my opinion, & maintains that if y constituent contracts, consigns or assigns voidable only will not protect this privilege, but construe them as void. & this would be agreeable to a case in Keble 3 Keb 369. in wh it appears, that a hairdresser agreed with a young woman who had a beautiful head of hair, for a certain weight of it. In consequence of her not knowing y weight of it, the whole was taken; the Ct ancient of this agt y barber & y jury found y contract was void. the Chief Justice directed y y contract was voidable the property passing by manual delivery, but y Ld held him to be a trespasser, for construing it voidable in such case, and he compell y Barber to restore if taken or pay the value of it. and he obtained a verdict.

Ld Mansfield afterwards y y decision

Contrt. void de[illegible] decision & I think correctly
Obj.: Case of Contrt selling a house to a Bankrupt
the goods are not to be [illegible] for considering of contrt. not voidable. It
rests proceeding & making a formal demand
&c. might be ground of action tossing the house
- then let goods be ratified & Contrt. confd
and Buyer sue him immediately as altho.
Trover. — The case on Ben ag: contradic
tory - & we must decide upon principle
& the above I think is correct.

I have been thinking
chiefly of Contrt executed, as to grant executory con
tract of Bankrupt. Then to be in gen: but
voidable. Altho' there are many expressions
&c. to the contra. Now a Bond & a single
bill are agreed gen: to be voidable, but Rex v Jon
contra me this opinion. is 3 Esp R 76. 5 D & R. but
contra 1 Bro C C 36 & Comyns. 1 Vesey 1. Sho 35. 997.
1 Vern 51. 1 Ld Ray 11. 5 Johns. 150.

As to a Penal Bond being void or
voidable see end of 4 title. & Smoot Rep ca 13.
Now it may occur to you that this distinction
between void & voidable contrt. is but technical
only, but practically it is as important as any
distinction in y Law, if a contrt. is void, it
cant be ratified, if voidable only it can, in case
of a void contrt. any person may take advantage
of its invalidity, if voidable only it can be taken
only by y parties interested, with many other

other similar points of distinction 1 Bro C 38. 1 Mod 25. 2 SR 603. 4 Co 124. & 6 42. 2 Wms 511. 3 Burr 1604 1806. 1 Ford 74.

A voidable contt. may be confirm. by either an express or implied ratification as by an Infant after a voidable, if he continues possession after full age he is bar the for all rents in arrear, as well for those not accrued during his minority as those accrued after full age, for his continuing possession is an implied ratifice, & when a voidable contt. is ratified it is made good by all parties & Bull at 69. 1 Ford 132-3. 9 Co 65. Sha 690. Cro. J. 320. 2 Vent 203. 6 Litt 32.

A void Contt. is incapable of being ratified, for it is in legal contemplation a mere nullity a legal nonentity, & there is nothing to confirm. In case of an Infant contt. he may indeed make a new contt. of the same thing, but even here the first only as a new contract, but will not help the formation of the void contt. or at all affect the rights of the parties thereto. Co. Litt 2 Sid 65. 3 Keb 814. Sha 3. Bro 201. 482. 4 Bac 683. 1 Atk 454. 1 Bro C 33.

An Infant having made a convey. by Fine or com. recovery may aver his minority avoid it by a writ of error but never afterwards, for there a record which imports a convey. & it will not allow it to be set aside by his infancy except one

Contr. void &c. on Inspection or view of him, & will not
estop his eyr to claim by gr. even by, the gr &
on view of him may if they please receive ad-
ditional evidence of his age 1 Bac 380. 12 Co 132.
3 Mod 229. 12 Mod 197. 1 Rol R. 21. 23.

Obs. Estoppel con-
veyance by what is called matter in Pais. that
is by conveyance by matter not of record as
feoffments &c. it has been said he may avoid
them either during his minority or afterwards. but ye Book is to be incorrect, & that he
cannot avoid them till after full age, the
reason is obvious, for if he could enter & his
minority to avoid his feoffment his act could not
bind him than his original act of feoffment or de-
very of seisin, the last acts would all as well
as ye former be void all 3 Bac 1794
1808. 1 Bl R 579. 2 Bl R 161. 3 Bac 136.
There is not confined to feoffments but it is there
taken only for example sake but is applicable also
to a Lease & Release & indeed to all other con-
veyances by matter in Pais.

If an Estoppel make a
Lease for Years & none is granted tho the contra
is laid down in 1 Bac 380. but Lords. Mans-
field Wardwicke & Mr J. Buller & those my
Ld Coke & Swinburn & Bac cannot avoid
his Lease for years after full age &c. 2 Bl. R 1169. 3 Bac 137. 140.

Act the rule enforcing Infts to avoid their contts. case of Ben. Infts is as far as I can discover that he can do it at any time until before attaining full age. for this a knowing kind of Infts. should be encouraged & the law not take advantage of his priviledge as soon as it is likely to be of no avail to him. Indeed a contra rule would effectually defeat his power of avoiding his contts. in most cases. 2 Ball 41.

Infts

Infts. a little on this account to pay their contts., i.e. is subject to an action for it.

Exempt. Cases in Equity.

In relation to Infts contts. I have thus far received them as in the Law, & in gen. they are regarded in Equity as at Law, but there are cases, wh. may be called exempt cases in Equity, in wh an Inft is bound by his contts. tho he clearly not bound at law

Thus Marriage Settlements, made by an Inft with consent of Parents & guardians are in most cases binding in Equity, Ther Mar. Settlts are made in consideration of Mar. & with view of providing for a family, But at law these contracts are not regularly binding upon an Inft. But in Equity it is considered that as he is thus permitted by law to make the contt, he ought to be bound by such reasonable agreements

Cases in Equity agreements as are analogous to it 3
Atk 56. 1 Bro C 152. 1 Pow C 42. 44.

In cases of y^e kind the Ch^r of Eng assumes
a kind of discretionary power or controul &
directs their consciences accord^g to y^e circum-
stances of y^e case — & so may from y^e Law.
The Lord High Chancellor of Eng is considered the
paramount Guardian of all y^e Infants in the
kingdom
accord^g to y^e cases decided under y^e head. Ch. Atk.
can to have understood there was some distinc-
tion between y^e agreem^ts of females & those
of males, & have enforced that of y^e former fur-
ther than those of y^e latter. as for instance
female can act no effect between them, & what
rule will be a safe one for proceeding in
y^e case is difficult to determine

1st It has been determined that y^e interest of a female infant in a
married portion was bound by her executory
agreement before mar^e 3 Atk 603. 2 Vern 501
1 Bro C 111. 4 Bro. P 19. 1 Pow C. 44 & 46.
And it makes no diff^e whether she interested was
in possession or reversion, indeed it has been
determined that she was bound when the
portion depended upon a contingency 1 Bro C 121.
1 Ver 374. 3 Atk 608.

2d Determined, that a female infant
may bar her right of dower by a settlement
by way of jointure, & even that jointure was

was of Ber. Prop. — wh wd not be good at Law. such agreement being made before mart. & with consent of Parents &c. wh consent is presumed in all these cases / 2 Ch. Ca 101-2. 5 Bac Ab. 570. 1 Vez 454. 1 Vern 453.

3d Whether a Male infant by such agreemt for himself & his ancestry, is not bound. Counsel says he can. not 4 Burn. 19. 1 Fonbl 65. 90. now the only diff. I can see is, that Females may be more important to a male than to females as they have a whole contract over it, wh is not so with females.

4th But it has been determined that a Male Infr. Lease for Lives was bound by such agreemt. Stra 664. Vern 552. 1 Salk 279.

5th And Lord Macclesfield once held, with respect to a female Infr who was seised in fee that if she covenanted to marry to convey for an adequate consid. to her Husband. Equity will enforce & contra (2 Vern. 243.) Lo Hardwicke says the decision is going a great way, but he seems to allow that there are some cases in wh equity will enforce ye agreemt. (3 Atk 613. 615) But Ld Rivers on ye other hand expressly denies the rule & says she wd not be bound altho she took an adequate settlemt. unless she took possession of ye settlemt. after coverture terminated. & then ratified it. in wh case he says Equity will enforce it, if equity arises from her own act. Vide Action this to shew how the subject stands in point of authority. & Dom

Compt. Ch. in Eq. am inclined to think that the rule as laid down by Thurlow is the correct one & the other agt him. 2 Vern 243. 2 Atk 670. 675. 1 Bro C C 116. Thurlow Jenins, 1 Bro C C 56. 4 Ves. Jun. 17. 18. & Ca Ch 210. 3 Wood 453n. all these later cases go to support Thurlow rule

Now if quest. may be asked why the cant. bind her inheritance as well as her Lease? the only reason, why she can bind her Prop. at all before mar. is from y necessity or presumed necessity of providing for y family, & these rules should be relaxed in favour of her Husband whenever this end can be answered without going to the extent. & this end can be answered by making y conveyance for Love, & as there is no necessity of alienating the whole inheritance

But it is an agreed point that a contract of a female subject to cant. bind her real estate must be made before mar. 3 Wood P. C. 514. 3 Atk 56. 1 Bro Chancery 70.

6th Do gent quest. on y other hand what her situation must be, can bind her reversion not settled, Lawrence says he cannot. Hague with him, & that y covenant shall be with Lawrence alone &c.

7th But it is settled that y marriage with mar. with an express covenant that her real estate shall be settled to certain uses, he is bound by this covenant — for there can be no trust of this in Law to arise, but he may

only a bar from a right which might arise by the marriage — If she is old enough to dispose of her [illegible] 2 Bro C.C. 545. 1 Ves Jr 96. 4 Cruise 19.

But no agreemt. whatever made by an Infant before mar[illegible] & in consid[n] of mar[ge] will bind his or her estate, unless it is fair & reasonable, & upon adequate consid[n] & all their affirmative agreements are to be taken with this qualification, for otherwise Equity whose province & discretion may intend to enforce them 2 P.W. 244. 1 Bro C.C. 115. 1 Ves 152. 2 Catt 615. 1 Vern 70-69. 1 Bro C.C. 49. 50.

If an Infant capable of making a Will bequeaths [illegible] Legacies for payt. of his debts, his Ex[r] is obliged in Equity to pay them, tho' Infant himself was not, for as he has a right to give donations Equity considers him as not only having a right but ought upon principles of natural justice, to pay his rightful debts — indeed in strictness they may be considered as a gift to Creditors to the amount of their debts. 1 Eq Ca 282. 3 Ca 146. 1 Wms 460. 1 Bro C. 37. 1 Vern 314.

I have already observed that if an Infant by a Deed, after full age ratifies a contract made before he is bound by it, and in Equity an express or implied ratification after full age, to a contract made by another before marriage will bind him, thus the Mother & Grand[m] of six children made a lease for 41 yrs

Exempt to a. in Qui & belong to them the child must
thereby an arising of any reinvestment it was held
in Ch to be an implied ratification of Revocation
made by y Mother. 1 Ch Ca 489. 490. 3 Da 140.

What Powers and Authorities an Exr. may exert

Hes a settled
rule that an Exr. cannot execute a gen Power
over a real estate it is found when his express
grant of discretion, thus suppose a devise of real
est. to y use of such persons of ch as an Exr shall
appoint, now ch cant make y appointment
for it requires a discretion to make y selection
y appointees wch y Law will force him not
to. Forbes. 1 Ves 296. 304. 3 Ch Ca 699. Pow 442.

But a
mixed Special Power, he may execute. By this
mixed Power is meant a Power without an
interest to y Exr. wch he is required, & at no
rights of his and he endangered by y execution of y
Power, he does benefit by right of Survivorship, &
y Power being special no discretion is required
by y Gr. & gives B an Exr a power of ch to
execute a conveyance free of an estate to y Gr. he
may execute y Power, for the instrument
instrument 3 Ch Ca 710. 714. Hurst 52. Pow 243. 48.

But he cant execute a Power
over his own inheritance, for this no affects
his own interest, & his own priviledges will be
infringed, for the Law supposes an Exr shall not

Powers & Esq not sane enough to know what he
has power to do in case of his insanity
can, of a devise to an Infl., with power to convey
to whom he pleases, he takes fee at law but not the
power, for y' insanity annuls this power
Ves 306.

There is a case laid down by Sr Thomas
Wh is innovat, "Lord Rhodnicke is made to
say that an Infl can in no case execute a
power & that there is no precedent either in
law or equity wh is contra. — I mention this
that you may not be misled by it 304th
310. 3 Ba 138.

The Gen: Rule then seems to be, that an Infl if
not interested in y subject may execute a pow-
er over it so as to bind his Principal, to the
extent of his power if it does not involve
a discretionary power over real estate — but
you observe he may execute a discretionary pow-
er over pers. prop. by Will Ves 304 to 306 Powe
R. 43 & onward.

And he may execute even a gen.
power over pers. est. & that too so as to affect
his own interest, if he is old enough to legu-
ate his pers. prop. by Will, but he cannot execute
a direct power over such est unless that pers
thing, pers. prop. is bequeathed to an Infl with a
power to dispose of it & even the Persons
there that the prop. is given to him he may exer-
cise it or execute the power of appointment by a
Will

(Powers) Will, and tho' joined to mere title & he thus is empowered to dispose of it without power, he cannot dispose of it any other way than by Will without a power. 1 Rep 363. Nov. 264.

When an Infant who is tenant for life with power to make a jointure contracts to settle part of it upon his Wife for life, & only settles upon her who shd happen to be his Wife & survive & executors must pay. 2 Vern 219. Show 264

What Offices an Infant may execute.

This rule is intimately connected with the preceding Section Offices, or authorities or Powers.

It is laid down in the Books, that an Infant may hold any Ministerial Office, requiring only skill & diligence, as that of a Bailiff. Steward, Judge &c. But he cannot hold a Judicial Office 1 Salk 396 & 606-7. 3 Bac Ab. 126. 725. 726. The reason as to Ministerial Offices is that if there is incapacity or nothing more by way of discretion it may be executed by Deputy 3 Bac Ab 725. 726. 1 Mod 4. Bac Ab 729. 556. 3 Bac Ab 162.

This reason which seems to prevent a extension to the application of the general Rule — as to Judicial Offices cannot be executed by Deputy

deputy, he can't hold it, for it does not come within the reason of the rule. How far this is in this county I don't know, but I have never known an Office in Office in this state.

In Eng. there

Office or a share of profit. Is not such enumerated among the enumerated sorts of incorporeal hereditaments, & held in tail, in fee, for life & for years. But of genius of our government does not allow of such regulations, & usage & custom has been for hundreds of yrs. - but it may be made a question how far the Eng. rule is applicable here.

In Eng. an Office can be an

~~office~~, because it cannot [illegible] the oath of office but is an additional reason the office is not strictly ministerial but partakes much of the character of the judicial, the exercise of a ministerial office is always by order of a superior, this not the case with an office 3 Mod 126.

In England

can't be a juror, 1st because he can't take the jurors oath, & 2d because the duty of a juror is strictly judicial Kyd 325. 3 Mod 126.

But he may be

an Executor or any one in right or mere, but he cannot act or intitle himself, can Ex'ty of any of the Law or Officers, can Adm'r or agent.

And where

ever an Office can hold & execute an office

Sheriffs office, he is bound by his official acts & negligently liable for his neglect of duty
Thus an Insp. jailor is liable for an escape notwithstanding his infancy, & even in an action of debt — if y' escape was bound on Execution 5 Co 27. a. b. 8 Ed 4 fol. Bro 364. 2 Da 125. 2 Sh Abr 129.

How far an Insp. is affected by y' Non performance of Conditions annexed to his Estate.

Conditions known in Law are of two kinds, express or implied. On an express condition an Insp. is bound, therefore if an Insp. bind himself under a certain penalty, & covenant to perform y' condition of y' condition, but the Insp. not forfeit his estate and an action Case, if an Eq. of Redemption falling to an Insp. if he neglects to pay y' money bound on the mortgagee entitled if forfeited, for y' words to repay is express. 1 Brat 468. 2 Vern 556. 3 Ch 343. 2 Lev 21. 2 Co 44. Bart 43.

The rule however does not hold if the condition imposes a pecuniary penalty, as distinguished from a forfeiture of y' est. The Insp. does not become answerable for penalty on non performance of y' conditions thus if Insp. bind himself to pay double or treble rent, & one fourth on a certain day, if this case double rent upon a Insp. is not bound, the double

double & neutral in matter of a penalty & not the condition upon wch y estate is let
Gen. 3 Ba 129. 1 Vent 200. Carth 43. 1 Inst 246 b.

Conditions

raised by C. & by L. those which are raised by C. & are founded (as is stated) "upon skill & confidence" are binding upon the Lessee. Thus if a Minister &c is granted or descends to an Ch. & he mismanages it he forfeits the Office for it is a cond. implied by y C. that he shall well manage y Office. Bro. C 556. 1 Inst 233 b. 246 b. 1 Roll 62-3.

But if the cond. implied by y C. are not founded on skill & confidence, the Lessee is not bound.

I observe lye the by, that when y cond. implied is founded on skill & confidence, if non-performance of y cond. is a breach of trust, acceptance of rent, with full knowledge that the Lessee is doing for the time being what is forfeiture by y Grant for y Lessee is supposed to understand & to act thro' ignorance, but y Law will not excuse in him a breach of trust

Conditions implied in conditions raised by Lessee. Hence it is, that when the Lessee gives a power for y breach of any condition, he keeps it bound. Thus the L. Gov. gives a right of recovery for y Plaintiff wasted & treble damages, & thereby he has y inheritance. An Assigned Lessee under the L. of Gov. 1 Chan. Ca. 44 & 2 Ch. 283.

Conditions } But when y Ld gives the party
injured no right of recovery, but a mere
right of entry, y Covt is not bound & of course
does not forfeit his ests on breach of cond.
thereto, in case of an alienation &c. & Ld of Mort.
remains, vid provided that when a Tent. alien
in mortmain the Lord may enter, but
does not give him a right thereby of but
Remainder of his Alienation, I do never see
& believe there is none, but it is Law
& Co Litt 46. 1 Inst 233 a. 1 Roll Ab 424.

But Impl. annulla
Doubts are taken by Ld of Lim. unless there
a special exception or saving in their favour
(wch Policies is almost universally the case)
but when there is no such saving they are held
for here the Ld Lim. is considered as a condi-
tion annexed to a right or matter & remedy
& this doth it & after such Lease shall be
construed to an Impl. Lease 1, 1 Eq. Ca Ab 94. Pl. Ca. 216

There is a rule
laid down by good authority, That if an Ex. or Ad-
mr. or Trustee of an Impl. neglects to sue
within y time prescribed by y Ld of Lim.
& Bar. thereby is taken the exception
or saving of y Ld in his favour notwithst-
anding. This is laid down without expl-
ination, but I suppose y meaning of y rule
is, That it relates to cases in wch the Ld
a other person had the right to sue, as this

his own name, & so if he is guilty of neglect he subjects himself to y^e Def^t, then, in case of a promise made to A. who dies. the benefit of wh demands to B. & inst. here the whole right of act^n is in y^e Ex^x or Ad^x of A. & the non performance within the 6 years preceding y^e Def^t Jac 1^st the act^n is barred, — for Def^t B. never had a right or remedy agt debtor

But on y^e other hand. B take it. y^e rule cant extend to cases in wh y^e suit is to be but in Def^ts right & Def^ts name, for if that was the case of bonds &c to be but a dead letter. For here the legal title is in the Def^t & Ex^x has no right of act^n at all in the former case the legal title was in Ex^rs. & y^e Def^t had no right of act^n 3 T. Rep. 309.

How Infants are to sue & be sued.

(c. How an Inf^t is to appear & by whom appearance is to be ent^d for & agt him.

1^st How he must sue. Clearly is the case due to that by the Guardian or Prochein amy. — or next friend. The meaning of this is that he must appear by his Guard^n & the Guard^n must appear for him through out the Proceedings. He must appear in one of these ways or not at all, for he cant appoint an attorney — for y^e Power of attorney is void, he in Infancie persons from want of discretion

Prov me { discretion. Palm 225. 250. Cro Jas 640. 3 Ba 146.

If Plea in Suit second after by Guard. or next friend, Defft may plead it in abatement i.e. to the disability & thus defeat the suit. 2 Bl 301. 2 Saund 211-3 Wms Notes. Carth 123. 1 Salk 1356.

Antiently an Infr. did appear only by Guard. he did not in any case sue by next friend, indeed not a character was known to the C.L. But by St. 1 & 2 Phil. & M. he is enabled in certain cases to appear by next friend, but there are only 2 cases of privilege Cro J. 640. Palm 295 Sho 709. 2 Ba 680. Kirby 409.

The cases of privilege in wch he may sue by next friend are four 1st When he sues his Guard. — as he may do. 2d When the suit is ag.t a stranger but Guard. will not appear for him, but standeth neuter, & is willing to relinquish and lose his chance, for if he defends the suit cannot be dismd. 3d When he has no Guard. 4 & 5th When in the lang.e of the Law he is divided from his Guard. i.e. is out of the ward of his Guard., & all other cases remain as by the Guard. Cro J 640. Palm 295. Sho 369. Salk 92. Cro C 135 Hob. 2 Ba 680. 3 Ba 149. Palm 296.

There are indeed some opinions by wch an Infr. may sue by Guard. or next friend at election in all cases, but these opinions do not appear

How Ever } appear to be Law. Indeed if they were Law, the whole Power of the Guardian would be taken away & a Infant left to squander his estate at pleasure Bro C C 86. Abr 92. 1 Inst 135 b.

If a suit is brot by Next and Guardian the being an infant but be being over 14 yrs, he may not appear by Guardian but both may appear by an Attorney appointed by the Chancellor 2 Saund 213-3 Br 150

When an infant sues by guard" the guard" is liable for the costs & may be compelled to give security for them before trial, So also in case of a suit by next friend, the next friend, is liable Eq. Ca Ab. Abr 500. 1745. 1 Br 491. 1 Wils 130. 1 Vern 266. This rule is founded upon a two fold reason viz that of protection of infants estate, for guard" may bring as many suits as he please for the Infant & without his consent, & thus infants estate might be ruined by bringing groundless suits if this guard" was dishonest. & 2dly Guard" might bring as many suits as he pleased to vex & harass the & having no remedy against him, the Defendant would be put to infinite costs & Infants estate not able to refund them

And Guard" is liable to be attached upon non payment of costs 1 Atk. 355. & Gilb. C. 87.

Accord" to some opinions, the Infant is also liable for the costs & Defendants may recover them of suit at his election 2 Wil 291. Gilb C 87.

Thus Inft. case & Thus Lowndes does not seem to be Law, the case in B. Wms. is the only case upon the point & upon a rehearing of the same case before Lord Chancr. King he denied the rule & said there was no case in which an inft. was held liable for costs either at Law or in Equity & that a State to be the rule, but the decisions are not all agreed with regard to it. 2 Ves 709. Ves Eqq. 1 Bulst 109 & 20 67. 2 Eq. Ca Ab. 236. Mitf. Plead. 2. 6. or 26. 1 Wils 130. 2 Stra 1215.

Now in these cases the Guard. is not bound to give all inft. right at his own expence but the rule is only for Deft to rack the costs of the guard. A solicitor Deft. shall not ordinarily be guarded from costs & not depend upon the settlt of the Guardians accounts before & perfect Ct. act in Eqy. as 2 Eq. Ca Ab. & in this county & probate Cts. — And then to the parties are made as secure as Deft. ille, for if the guard. was dismissed the amendment will be allowed, costs if not.

But on the

Deft is as clearly liable for costs as an ordinary for in case of misconduct agt him he is subpoend to be in the wrong, indeed if he was not guarded not to defend agt him, & he was not then liable agt guard. might stand after sentence & then defend and compromise, viz. the 1215 Eq 104. 1 Bulst 89

Defts Solr. } There is a rule contrary to this laid down by Lofft in his Digest who says Guard. is liable for costs in person. but he does not support it by any case. & it is not warranted by the Law. Lofft D 164.

If a Guard. Infant. must be admitted by the Ct. or by a writ out of Ch. to appear for the Infant before suing for him. there is a reason of precaution as to the sufficiency of Guard. & to grant a Dft. from an insufficient recognizance 1 Sho 304. 309. 2 Ray 232. Palm 225. 250. Carth 256. 3 Salk 603.

In Com. either Guard. is by Guard. our Cts never enquire into his qualifications. but leave it to the Cts of Chy. & suppose it that they may remove him at discretion for any misbehaviour.

But if Guard. is by Next friend, Semble that he cant appear as such by permission of the Ct. but it is said a Certificate is requisite. this is to prevent Infants suing their Guard. Ct. decided that the admission must be actual — but if Guard. has not been admitted Kirk 410. 419.

Any person however may bring a Bill as next friend to an Infant & the Solr. in making out the letter he has Dft. commonly put, for the Infant in this Court, & the Dft. instance & eventually the Bill of the next friend pays costs. Lofft.

But if it may be
admitted

Infant } & minor & this must be found if they plead
Coverture } that the amount of the rule is, that
any adult may commence a suit for an
infant & the Court will then decide whether
or not he shall continue it. 2 Ba & So
3 Ch 119. 151. 1 Eq. Ca Ab. 1 BC 464. Ruly 111.

If an Infant
an adult or a Fem. sue in an act. brot. by them as
such they may both appear by Att. for tho'
the Fem. is in the right for another tho no rights
of the infant are endangered. But the adult may
appoint an Att. for both. 2 Ba & So. 541. Barb
123. 2 Saund 212-3. Mun 192. Stra 734.

But if an Infant
an adult are sued as a Fem. the Infant must
appear by Guard., for here the proceeding is
as to them in invitis, & they may not be
as Fem. they are not bound except by themselves
by another in law.

It has been said some where
as cited, that an Infant when sued alone as
Fem. may appear by Att., because no right
of his is endangered by being sued & being
sued he is liable for no costs. 3 Ba
150. Bar & So 542. But this case has since been de-
nied & is not now considered as law Bar
34. 141. 1 Rol Ab. 1 Mun 192-3. Barb 123. 2 Saund
212. 113 Bac Abridg.

2d How an Infant to be sued. & how
he must appear as Defdt.

The ancient Rule here remains
& an Infant Defendant always appears by
Guard.n for the better Security provided for the
appearance by next friend, does not extend to
him as Defdt. it relates merely to him as
Pltff. — so that a Plea of an Infant Defdt must
always be signed by his Guard.n & not by
an Attt. Palm 225. 250. Cro J 640. Rast 92. Cro
Eliz 131. Mod. 266. — — — —

This rule is carried so far, that
in an act.n ag.t Husd.d & Wife, Infants of age
to defend, the Husd.d cannot appear for her in
the capacity of Husd.d nor appoint an
Attt for both, nor appear as next friend
Defdt not coming within the Statute. Roll
206. Vent 165. 2 Lev 5. 2 Keble 676.
But where Husd.d & Wife are Defdts & both
of age, Husd.d may appoint an Attt for both
i.e. both may appear by Attt. for there is
no rule requiring Wife to appear by Guard.n
more than Infant Defdt. 1 Vent 165.

If an Infant who has
no Guard.n is sued, the Court will appoint one
Procreator, & he is called a Guard.n This
This rule is founded in necessity for he cannot
appear without one, and every Court of Justice
in order to [illegible] may [illegible]

The Court has authority to appoint a guard.n ad litem when he has no appearance. Chit. 536. Ld. Raym. 368. 1 Salk. 40. Ghest. 135. 2 Ld. 195.

But if the Def.t has a gen.l guard.n the Ct cannot appoint a special one ad litem unless if former was out of reach of process, or has misconducted himself as the convict of that he was not a proper person to conduct the suit. 1 Ld. 424. Ld. 156. 3 Ba. 156.

When a Gen.l Rule is if an inf.t has a gen.l guard.n the Pltff must summon him to appear in suit & defend, — the practice however will not abate if he is not summoned but if Ct will give time for the purpose of citing him in — this is rule of more practice

If an inf.t Def.t appears by atty & judgt goes against him, it is error & writ of error to an able lies to reverse it. But it is not universally true that the act of an infant is void. for if there is a higher Ct and has cognizance of the case it may be brot before that Ct, but there is no impropriety in his acts if void. for they are not to be considered a legal decision of their own, but to decide on a fact of did not before appear. Salk. 58. Bro. Ab. 41. Chit. 92. 2 Ba. 116.

Hence a decree & decree if Def.t is cited without summons of his guard.n & judgt

judgt. goes agt him by default
in the Exchequer. However that can hardly
happen except from some irregularity in
the proceedings for there judgt never goes
by default unless an appearance or
part of Defts. — This rule applicable to
your case. As in the former case, it moves
for a rule to appear & plead & final
judgt is given either for or against him
this error, at C.L. There is however a distinc-
tion taken in Tidd 441 & Imp. that if
judgt is for him it is not error, if against
him it is error. This seems very reasonable but
the current of authorities is against it & it would
established indeed the opinions are to the
contrary Tidd 924, 1 Sid 297, 2 Saund 213 a
Carth 123.
But now by 4 Ann Cap 16 if judgt be for Deft
upon verdict it stands & is not error, &
further by 5 & 6 Wm & Mary if judgt goes
in his favour after being duly by confession, nil dicit
or non sum informatus.
Judgt now in this case by default is for Plaintiff in the
favour is good, but judgt against him is erroneous
2 Saund 213 a.
In Com. as far as I am informed we have adopted
rules, indeed a part of Deft that Plaintiff

Defts. sued } the rule is to be acknowledged

But it is to be observed that not-
withstanding these statutes infancy may
be pleaded in abatt. — for ye effect of these Sts
only to take away error after final judgt rend.
Carth 142. 2 Saund 213.

If an inft is sued with
others who are adults & all appear by atty &
a verdict damages are found agt all & ye Deft the
judgt thereon is erroneous in toto. & not
the inft alone. & ye adults may bring
inft in a writ of error, & reverse ye judgt for
ye whole tho finding entire damages unless it
can plainly appear for ye Ct to determine what shd
be charged agt ye adults & what agt ye inft
Cro. Jac. 269. 1 Rol Rep 96 Carth 89. 3 Keb 435.

But if in such case several
damages are assessed the judgt seems to be
erroneous only as to ye inft, & ye inft may cause
the judgt as to him only to be reversed by a writ of error in his
own name, & it will remain good as
to the rest. Case of Hundred agt an Inft & an adult
— several damages &c. 5 Co 5 b. Sho 189. 308. 4 Burr 2022.
1 Rol Rep. 776.

On Com. it is noted that when Inft & adults are jointly
sued in Trespass & judgt is awarded on a entire damages
the Inft may reverse ye judgt quoad himself; & it will
remain good as to adults Keir 116. This is on ye ground
that all ye Defts were joint Trespassers. & each was

was liable for y whole damage. — but this does not justify the decision, the difficulty is as to the rule of damages

If an Infᵗ & an adult assault together as Co-Dᵃˢ y Infᵗ must be officer y Guardᵗˢ. for there is no such thing as officers by next friend or Infᵗ acts if Offs. Stg 316. 3 Mod 286. 3 Ba 151.

If an Infᵗ and an adult join in buying a Tune, it will be void as to Infᵗ alone. It will remain good as to adult thus ch & B. Ent. in com. B. being an Infᵗ buy a Tune, this Tune tho' in form a joint purchase of them, is in substance but a com. purchase by Deed or Record. there is no reason then why it shd not be void as to Infᵗ concern, accᵈ to the rule subsisting Infᵗ contracts. & still remain good as to adult. Hob 276. Cro E 115. 124. 2 Leon 108. 2 Ba 229.

Infants in Tort &c &c.

There Infᵗ are so many purposes are considered as to age, that not as to all. the modern acts on this subject are much more liberal than the ancient, & this Infᵗ one more considered in age as to many purposes for wh formerly they were not. 1 Bl 126.

The wilful destruction of one of these being in nature murder, but with a great mitigation? i.e. an offence of the highest kind short of felony. 1 Hawk 121. 4 Bl 196.

Co. Litt. 11 More } But if such a child receive a mortal injury, & afterwards live a life & die of of injury within a year & a day after receiving injury, it may be murder, that is, it is the subject of murder, & is considered in the law as a person. - Every man to make, for the killing of a living child, or person, may not be murder, as it may be M.S. in homicide 4 Bl 197-8. 1 Hawk 21. 2 Just 50., there is still a the same high crime of Male contra 1 Hale 433

14. Co. Litt. in note 8. may inherit from an ancestor, title. the birth however the estate descends upon the Heir immediately & is vested by the birth in favour of the posthumous Heir. Thus by the Law of Eng. if a man dies leaving a daughter & his wife enceint the estate descends upon the daughter as heir & remains in her until the subsequent birth of a son when it devests her & the Infant then by relation inherits the estate from the death of his father 2 Bl 208 8 Co 30. 1 Roll 911 a. 911 a. 1 Sid 424 Mod 65 3 Keb 6 a.

2d And as the Law now is such an infant may take as devisee, but formerly he could not take by devise but only by descent devise, this however is now done away, & a devise to the unborn son of J.S. or to all persons of J.S. living at my death, will prevent the child born after testators death the mother being enceint at the time of his death with that child Peare 429. 432. 4 Burr 2157. 1 Bl R 643. 2 Wils 229. 3 Wils

3 Atk 526. 1 Ves 466. 2 id 28. 2 Eq 14. 1 Bro Ch 385. 5 T.R. 49. 51. vid. infra.

2d Rules the same as to a Legacy given as above 1 Bro Ch. 385. 1 B.C. 30. 1 B & P 243.

As to the distinction between Devise & Legacy devise to Heir &c. it is not my business here to enquire, no as to Devises.

It has been a Point much disc. & one incidentally argued, whether under our St. an Instr. in writing whereby one might not state an est. by Deed or grant, the words of the St are, "that no est. to be void or given by Deed or Will to any person or persons but such as are in being or to be immediate issue of such as are in being". It is conceived no grant at all, for the object of the St was to prevent perpetuities, & not to give an effect to Deeds which was unknown to y^e C.L. St Com. 43.

2d When an estate is devised to an heir in fee simple it descends to the heir, in the intermediate time between testator's death & the birth of Devisee, & at the birth of the Devisee is called heir as well as the heir by descent. he is called Hares factus in contradistinction from Hares natus. 2 Bro P.C. 1 P.W. 346. 2 vi. a. c. 1 Ves 114. 1 Bro Ch 385. 5 T.R. 49. 51.

3d He may also take a Devise when under the St Devises 2 P.W. 346. Bamadiston & Pole 2 Atk 114.

[illegible] 6th He may also take under a term created for raising portions for younger children as he shall have living at his death, & under "living" notwithstanding A "a term for raising portion" is meant a term created by a father for a certain number of years as 100. or 500. &c. vested in trustees for raising those portions. The continental families of Europe have a great aversion to dismember their inheritances; they therefore adopt this plan to compell the heir to provide for the younger children - for the term being vested, if the heir will not pay the portion mentioned, the trustees will hold until the arrear of term will pay them. Pas Ch 50. 1 Ch R 246. 2 Vern 342. 2 Abr Eq 399.

7th He also will take under a bond in favour of such children as aforesaid shall leave at his death, Case of a bond to trustees in trust for &c. 2 Vern 223.

8th & in like manner will he in favour of such child. Case of a devise to such child & heirs remaining his estate was but what did not settle &c. an injunction may be prayed next friend & Bill in &c. 2 Cont y. a. Par Ch 60. 2 Ch R 117

9th & also a testamentary guardian may be appointed, or else him; Else is a guardian appointed

appointed by Will by Letters under 9 & Geo 1 Bl 130. 4 62. 465.

10th And hence may be collected that the contract entitle 17 years ages in the mean time an adm de mine estate cum test annexo must be appointed, and the consequence of the rule is that if two children born they are Co. Litt 5 b 29. Off Ex 304. 3 Bac 123.

11th And penalty, if one Devise or bequeath an interest to such unborn child, if two shd be born, they and heirs as joint tenants 3 Bac 123.

Relative rights & duties of Parent & Child.

Children

Head, our enquiry under it must be to consider the distinction between Legitimate & Illegitimate children; for their rights are in some respects diff.

A Legitimate child is defind to be one who was born in lawful wedlock, or within a competent time afterwards 1 Inst. 244. 1 Bl 446. The meaning of d defn is merely this, that a child thus born is prima facie legitimate, & that no other than a child thus born can be legitimate; the rule or defn is not strictly true, tho' of a child so born the presumption is that it is legit: but this presumption may be rebutted Doe 940. 5 to 98b. 101. 455.

Parent & Child } Ch. Illegitimate Child

one begotten & born out of lawful wedlock or in other words neither begotten nor born in lawful wedlock. 1 Bl. 454

But this defn. I conceive to be incomplete, for suppose after the conception the parents intermarry & the Father dies before the child is born, even by y[e] 1st defn. the child will be illegit[e] but by the first head he legit[e].

The true defn. a bastard is one begotten out of lawful wedlock, & not born either during lawf[l] wedl[k] or within a competent time afterwards, Or what is equivalent to it, he is not begotten or born during lawful wedl[k] or within a competent time afterwards

In the 1st

case no other proof of illegit[y] is admitted but such as rendered legit[y] impossible, & he is held illegit[e] & to be provided for in one of two ways. 1st Impossibility of access on the part of the Husd. & 2d Impotency; Decidedly strong was the presumpt[n] of legit[y] 1 Hagg 244 a. 5 Co 98. 2 Ha 176. 7 & 8. Sac 123. 1 Bl 457.

Under y[e] rule when a child was born during wedl[k] or within a comp[t] time afterwards the meere impossibility of his legit[y] however strong ed not be proved & further no other proof of the impossibility of Husd? access or no admissible except his absence &

beyond the four seas & this to Dues Gestat
time of gestation. If he was within the
realm & even within a Dungeon during the
whole time of gestation, & presumption of Law
do not be excluded. 1 Inst 244. 2 Ray 995. Sal
122. 123. 1 Rol 356. Co. Lit 123. 1 Bl 457.

And Bruce of Kinnaird
had been absent beyond the four seas for
an indefinite length of time, & his wife
shd be delivered of a child however soon
after his return yt child wd be legit.

And the rule and the
same if a man who had been gone beyond
sea for any length of time no matter how
great, & immediately on his return shd
marry a woman who shd be delivered of a
child within 24 hours after the marr. it is the same.

But these rules are
now greatly relaxed & indeed are exploded—
It is now settled that non access may be
proved by any evidence wh goes to contradict
the fact. It is then left to the jury under
the special circumstances of the case pre-
cisely as any other enquiry wd be left Bull. N.
3 Wils. 275-6. 1 Mod 119. Stra 925. Cas. D. 464.

And if fact of impotency may be proved
now, not only by the want of age, but by
any other fact whatever which evidence
to prove it. 1 Ba. 311. Stra 940. Cas. D 483.

Thus for however the rule admits of

Proof of Child] of proof of illegit. no attempt
shown by what amounts to an apparent
impossibility of legit., But attempt
has the Law been relaxed of late. Proof
of illegit. may be proved by any evidence
whatever either direct or circumstantial
that conduces to prove it. Ex. of Mother
cohabited with a stranger during coverture; that
she took the name of the stranger, that the
child was reputed to belong to him, & was
called by his name, or that of mother that
an acknowledged child belong to him—
as soon the old Law is abolished Law
Ency. 4 Ed. 556. Eq. Dig. 2434.

Thus you perceive that as to mode now is
the illegit. of a child can be and may
be proved by any evidence which gives mere
ly a strong probability of its being legit.
i.e. proof of the actual impossibility of
legit. is not required

The issue of a marriage
null & void ab initio is of course ille-
gitimate, & Maine sub. Ba), & a total div-
orce obtained for a cause subsequent to mar-
riage void ab initio, for the divorce thereon
relates back to the commencement of coverture Bish
495-5. Hag. 456. 1 Swa. & Tr. 235. 13 Ga. 311. Eq. Dig. 41.

But the
Legality of a marr. not absolutely void can
be said in great only during the lives of

Proud & Child) of the parties to it. & this is what is meant by the rule, that if issue for a mar. cannot be tried after the death of either of the parties to the mar. the mar. is good; & illegit. of the marriage, for it is not to be inferred of a child conceived & born after the death of its parents. for this can be done, when the child was born in wedl.k & even in Lawful wedl.k & the mar. of the child was legitimated by a statute before mar. by a stranger.

The reason of the rule alone was, that the divorce was formerly but a kind of spiritual discipline pro. salute animarum. now after the death of one of the parties it has of no use

If the mar. was absolutely void & bastards of the issue may be proved in a Ct of Justice after the death of both the parties & mar. BC 441.

A Child begotten & born after a divorce a mensa et thoro is presumed to be illegit. for the husb. & wife are ordered to live separate & it is presumed the order of the Court is obeyed, till the contrary is shewn

But after a voluntary separation of husb. & wife, the presumption is that a child afterwards born is legit. for as the parties by agreement, by agreement they are come together that the presumption in both these cases may be rebutted, the onus probandi however falls upon different persons in the different cases. 2 Hagg. Ecc. 434. 1 Hagg. Ecc. 467. Roth D 485.

Allen

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When the question of legitimacy arises upon the issue depending upon the question whether a man cannot be permitted to prove the fact of non-access by his own testimony, this rule says Lord Mansfield is founded upon decency & morality & therefore it is the policy of the law &c. & will not permit the parties to prove that such is com. presumption can be proved by other testimony. She can not prove her own incontinency, but this is because in com. presumption it can be proved by no other testimony Com 394. Bac. Abr. 112. 1 Wils 340. Esp D 435.

But the declarations also the husband or competent witnesses to prove time of the birth, & also the marriage, for there is here no nullification as above Com 394.

And in these questions of legitimacy & pedigree the declarations of father & mother as to the birth of the child before or after may be proved by other persons other after their death.

So also on answer in Chancery stating the fact may be given in evidence

So also Chancery evidence it is admissable for a witness to say what is common tradition & reputation

So also family records as memorandum in a bible — & inscription upon a tomb stone

And so of many other kinds of documents which are not admissable in other cases are admissable here because these cases can be proved as other cases

com. Cov. 591. 594. B.N.P. 233. 294-5. 4 P.R.3. Dak. E. 11. 12.

By the Civil &

[illegible] a child born before marr. is legitimated by subs. marr. between its parents, But by the C.L. of Eng. (our own) the child remains illegit. (Bol. 524. 6 Co. 65. 1 Bl. 454. 5 456.)

And a child born of [illegible] after the death of her husb. as round by ordinary course of nature it did not die at his time, is illegit., for he comes precisely within the definition" or within a convt. time after covert". 1 Bl. 456. Cro. J. 541.

What the convt. time mentioned in y defn., does not appear to be settled, diff. cases assign diff. periods, but the Medical authors are the best authority upon this subject. The works of John Hunter have nearly cured the evil by extending the time, but no certain limit can be fixed, as the time of pregnancy may be shortened or lengthened by a variety of circumstances not proper to be mentioned, see Hargr. & Butl. note. 1 Inst. 123 b. n. 1. 2. 1 Bl. 456. 1 Ba. 3 A. Cro. J. 541. Cro. D. 465.

Without therefore attempting to define the precise time, it appears that a child born within the usual time computing from husb. death, is presumed to be legit., But if born after that time it is presumed to be illegit., but by Law the pres-

Parent & Child) presumption may be rebutted at the time of birth & for distance from Husb.d but the fact cannot be rebutted. 1. Rol. 356. 1 Salm. 122. 1 Inst. 8. 1 Bl. 456. Cro. Jac. 640.

If a woman dismany after immediately on the death of her Husb.d (a thing, however not to be presumed) the issue could not have by law a child who be born within such a time as according to the common course of gestation he might belong to either Husb.d: it is said by some authors that on coming of age discretion the child may choose with which to live for his father & thus enter from one of his choice. But this I think can be the case, only in the absence of satisfactory evidence, but the law says nothing of such a qualification, tho surely it ought to be allowed to enable the child to make an arbitrary choice in the face of satisfactory evid.ce of his descent. 1 Bl. 456. 1 Burn 82. 1 Bac. 112. 1 Rol. 357.

This axiom of law, that no one can be proved a bastard after his death, for there another maxim that [illegible] 1 Inst. 33. 244. 1 Inst. 33. 245.

But if he holds only between a child born before the intermarriage of his parents & one born after the marriage, here the distinction still exists & the elder legitimate. But after the death of the first

first y^e 2^d. cannot call his Legitimacy in question. 3 Lev 410. Sal 120. 1 Ba 315 m. Co Lh. Dig. 466 Litt sec 399.

This rule does not prevent a child being barred illegitimate by imprisonment of the mar: after his death. for his death has no effect except in the case above, between a child born before mar: & one born after mar: & both of the same parents. — The effect of y^e rule is this, that if the elder enter upon his fathers estate & die seized, his issue shall hold to the exclusion of the lawful issue (or rather, if this younger son) of his father. — The rule is a positive one, & I can see no reason why this distinction should be taken 1 Co 44. Yelv 208 1 Inst 93 a. 245. 1 Ba 315.

But the exclusion of lawful issue in this case there must have been an uninterrupted possession of the elder (bastard) & a descent cast upon his issue, for if his possession has not been uninterrupted, or the question has arisen during his life, he may be evicted by the lawful issue 1 Inst 244 1 Rol 624. 1 Ba 315.

The Rights & remedies of Illegitimate Children

Ex. dig. 6. 4.

Illegitimate children are such only as the law regards to be conceived in no marriage, & hence they are called filius nullius, or filius populi 1 Bl 456.

Illegit. &c.) But this maxim, that he is nullius filius has been used in a sense far too indefinite. It has been said that he is "a kin to no one except his own issue, because kindred must be had thro' a common ancestor, — which he has not. But it is incorrect & the max. does not hold by any means for all purposes. His relations to others show his own issue is recognized by Law. For he cannot marry within the prohibited degrees. And one cannot avoid being many his Mother or Aunt. Indeed it is incorrect to say he is nullius filius 5 Mt. 166. 2 Ray 68. Cowl 305. Com. Dig. 1 Bl. 459.

Indeed it has been determined, under Eng St. requiring the consent of parents to marr. of their children, that if an illegit. married without the consent of his Mother or maintaining parent, the marr. was void. 1 D. R 96. 103.

The extended & incorrect sense in which this max. has applied seems to have arisen first from misquoting & then from misunderstanding the expressions of Littleton, who says he is quasi, nullius filius, because he cannot inherit." This if attended to explains the whole & the truth is the max. relates only to the Law of inheritance & as to this, he is, quasi, so far as to be nullius filius. Litt. sec 165. 1 Rust 123. 1 Ba 309. 1 D R 101. where see 2 max. properly limited & explained)

a surname, but he may acquire one by reputation / Swift 3. 1 Bl 458. 459.

and under the name thus acquired he may after full age make purchases, conveyances & contracts of any kind, & when under age has the same capacities as other infants Bow D 319, 338. Clerk. acc. 26. 1 Salk 410. 1 Swift 3.

And he may take by the description "of a the son of J.S." provided he has acquired the description by reputation, but still he is not in Law so considered, the son of J.S. so to claim maintenance or inheritance as J.S. as son. 1 Salk 410. 6 Co 66. Bow. D 338. 2 Rol 43-4.

But he cant take by the description of "issue of J.S. as it a limitation is made to the eldest issue of J.S." The reason assigned is that "issue" is a technical term of description, eq. synonimous with "heirs" & "heirs of the body" & as such cannot be construed / Swift 3c.

The name of surname is gained & surname by reputation & acquired from continuance of time, & common repute; none can acquire that character in a moment, at the instant of birth, & must be the reputation of the county & not reputation of the father. So if a limitation is made to the eldest son of J.S. legit. or illegit. & J.S. has none at the time, but afterwards has an illegit. that will not take for he is not [illegible]

Bastard} indeed a double contingency. first of
if he shd have a son, 2dly. that he shd acquire
by reputation the name & description of son of
J. S. & 3dly the mere improbability of an illegit. child
is too remote a contingency for the Law to allow, &
4ly. If he cannot take at his birth he shall not at all
for the Law will not expect longer for the increase
of reputation required, nor he cou have at his
birth. 8 Co E 510. 6 Co 65. 1 Just 123. 1 P Wms 547. Bould. 338-9.

It has been said however
that such a limitation to the eldest son of a wo-
man (as Jane Stile) may take effect in favour of
a subsequent illegit. child, because then con
is not uncertain as to his acquiring the re-
putation of being the child of his mother, & no
contingency is not so remote. Hoy 33. 35.
1 Ba 309. Ey 113. But E 510. Suppose and however
the strict rule of the Law will not permit him
to take in exclusion, not however for want
of the reputation of being the child of his mother
but on the ground that the mere improbability
of an illegit. child being born is too great a contin-
gency for the Law to allow, & the presumption of the Law
is always against such a birth. - This case of the
birth of a bastard is laid down by Ld as one of
the cases of the truth remote kind. Hargrave
inclines to that opinion, but does not decide it
& doubts still remain, my own opinion is as
above see 1 Just 123. b. notes 2 Ld 170. 1 P Wms 29. 2
Bro E 510.

An illegit.e can certainly have all his heirs except those of his own body. i.e. Lineal heirs, for all other kindred must be traced thro' a com.n ancestor, & for the purpose of inheritance he has neither father or mother as a son of the same mother commences from him 1 Bust 61. 1 Bl 459.

The settlement of such a child in Eng.d is regularly in the Parish in wh he was born, this is in consequence of his inability to inherit for a derivative settlement is a series of inheritances; the Parish however is but prima facie the place of his settl.t for it may be otherwise, but it is to entitle the contra is shewn 1 Bl 362, 363. 459. Sal 427.

And if the Mother, residing in another Parish, shd keep the child with her for nurture as she must do until it is of a certain age (7) still the Parish in wh it was born will be it's place of settl.t Doug 7.

When however a fraud is attempted upon a Parish in order to settle the child upon it, the law will not effect it. Thus, the Mother who was living in the Parish of A. was sent by the Officers of s.d Parish, into that of B. that the child might be born there &c. the child was sent back to A. Sal 121. 1 Bl 459.

Ex Gen. It seems to be better for grants & warrants to be decided as being the most recent

Illegit. Children } reasonable care. Not the right of the Mother is a right of the Child, but he can no more inherit here than he can in Eng. 1 Root 155. 1 Swift 169.

The duties of Parents to their Illegit. Children

There are
said duties in their obligation to main-
tain such children, the mode of enforcing
this obligation is prescribed by St., so that
the rules are probably diff. in the diff. States
see 4 Dl 457-8. 1 Ba 317.

In Eng. this subject is reg-
ulated by 4 diff. St. & the Law is merely lo-
cal, those particulars may not have been
so laid into our St, but the leading features
may have been, & there is probably an anal-
ogy between the St. of the diff. states.

In Conn as
well as in Eng, the Father & Mother are lok
Chargeable for the maintenance of the Child-
ren. 1 Bl 456. Sts Con. 99.101.

In case the duty of
the Father, under our St. a complaint may
be made by the Mother to a Majistrate &
on this a warrant issues & warrant
to apprehend the person charged 1 Swift 211

The Province of a Majis-
trate is merely to ascertain whether the
person charged is to be holden to trial or not.

Receiv. on bastardy } so all he can do is to discharge him on the one hand, or on the other bind him on recognizance to appear at the next county Ct. of the county in wh the child is born — The jurisdiction of a Ct of Final. Kirby 267.

The Mother is admitted to testify both at the Inquiry & at the Trial this & many precedents. 1 Con 54. 1 Swift 209.

The process issued by the majist. is forthwith (a capias) and that the form of the process is criminal tho the Offence is civil.

It was once supposed that it was necessary the complaint should be made before delivery but this is now overruled — 1 Swift 210. 211.

The oath of the Mother in this case is not conclusive, but it throws onus probandi upon the party accused but he is not permitted to testify & no denial can be made only by plea, & then on it will be an issue for conviction unless her credibility is impeached, wh may be done as in any other case 1 Swift 209. 210.

It is a prudent & judicious provision of our St. & probably made in consequence of the tremendous advantage she has, in being permitted to testify, that she must be shut upon the disclo-
sure

Circumstantial Evidence } disclosure of the Father at the time of travail, this being the period at wh she would most probably speak the truth, the omission of this is fatal, — nothing will supply it. 2 Lds Con. 54. 1 Roscoe 107. 1 Swift 209. 210. 1 Day 278.

When the town prosecutes, however, for its own security, it is not indispensable, this disclosure shd be made at the time of travail, but it is only indispensible when the party prosecutes for the town have not the means of convicting it. 1 Day 278.

The Statute also that she continue constant in her accusation of this life the preceding must be alledged in the complaint, wh it is has been determined to be substance & not mere matter of evidence. And if at any time she has contradicted herself or accused diff. persons she cannot recover.

If Deft is found guilty the judgt is, That he stand charged with the maintenance of the child, with the assistance of the Mother, & give security for the damages aforesd & also if required to save the town, & point from charge for child's maint & stand committed, the judgt is called an Order of filiation & is an example in the Law. 2 Lds Con 54. & 373.

Witness however that the form of judgt has been varied

But no such security is ever required of the Mother, indeed I never knew of any proceedings against her, that it seems to be within the intention of the St.

The amount of the Damages to be awarded is for the most part discretionary and according to the condition of the parents, likelihood of the child &c. but in gnl. the custom is to assess such a sum as will cover the expenses of the birth & death of the child, with the what the Mother can afford till she is four years old, this sum to be paid by instalments or so much quarterly Hist 26 E. 1 Com. R 416.

If the Child dies before the expiration of the period which the damages are intended to cover, the proceedings upon the remaining instalments are stayed, and on the other hand if the expenses are found greatly to exceed the damages awarded, the sum may be increased by application to the Ct. of Rem. upon affidt. will be inserted in judgmt. &c. &c.

If the woman has not been delivered at the end of the term of the Bond, & she and the Putt. was bound to appear, the case is continued of course till the next term & a renewal of the bond ordered 2 & 3 Edw 55.

If the Woman dies or marries, or an

Proceed in Boston } an abatement takes place. Deft is to
be discharged 1 Bl 45 8.1 Swift 211.

If the mother does not
prosecute, the Selectmen - in 3d state, or the
overseers of the poor in Eng may prosecute
on behalf for security of the town or pa-
rish, & the same course is here pursued
in case of conviction, as in the other
provinces.

If Deft on conviction does not pay or
find security he must be imprisoned, &
so for is the proceed.s considered, that he can
be discharged upon taking the poor-mans oath.
2 Mass Com. 55.

If the Mother commences a Prov.n & then
fails to proceed in it, the Selectmen may pro-
ceed upon the same complaint, or institute
a new one at election, — this is to prevent
collusion. 2 Mass. Rep.

What the Mother has sworn on her ex-
amination before the majistrate, is after her
death good evidence on wh to convict Deft
or enforce an order of filiation 5 Pick 373. Pick 259

It has been made a quest.n in this State
whether in a Prov.n by Selectmen, the Mother
is to be compelled to testify. It was decided in
the case of Salisbury v Davis, that she was
a Wit. in that case she refused to answer, but
was imprisoned until the court
she had been there not to make the disclosure

Proceed. Contrib. & discovery. Does privity not
offered in the Ct of Com. 1 Day 295. 1 Swift 211.

If she also been a guest in this
county, in which case the statute is, that
lying in support of her own complaint, she is
bound to answer gen. quest. as to her own
incontinency with others, — decided she is
bound. for as she is allowed to swear in his
support of her own complaint she ought
to be subject to a cross-examination. It was
agreed that she might decline answering
any such questions, which would be contrary to the rule
of evidence in that effect, but surely if she was innocent
then no less such danger of guilty, then she might
do it without disgrace

These trials in Com. be by the Ct
& not by the Jury. It is not a question of a special
in other cases, this system was once changed, but soon
after restored

The proceeding is both civil & partly
criml., for deportations are here admitted tho they
are not in criml. cases, then because the object
is civil 1 Swift 211.

Pet. appl. with Pet. for new trial in civil & appeal
is allowed, — this was once altered but soon
restored. —

The rights and duties of Parents in relation to their Children
Legitimate Children.

The duties of Parents to their

Duties to legit. Chil. } their legit. chil. consist principally in three particulars, viz Maintenance Protection & Education 1 Bl 446.

1st. The duty of Maintenance. It is founded on natural law & enforced by Municipal. Consists in providing nec. & by the Law of Eng as well as our own the duty is mutual upon both parents & children as we shall 1 Bl 443. 446 447. Doy 600.

The oblig. of Parents to support their legit. or minor children is absolute & unconditional, except so far as by Law they may be entitled to assistance from the Par. in Eng, or the town in ye country. By the E. L. I say the oblig. of ye parent is unconditional, for tho' are authorized totally incapable of supporting themselves, therefore the latter is liable for nec. given to them as much as if given to himself, & this too whether he is able to pay for them or not. 1 Bl 449. Bro. Ab 265. 287. 1 Vez 160. 3 Atk 399. 2 Doy 37.

This duty in Eng is enforced chiefly by Stat. 43 Eliz, & in Con Eng a similar one of our own 1 Bl 446. Lib Con 232.

And under this lib. the obligation of maintenance extends as well to Grand Parents as Parents does not cease with the infancy of the children or gr. child. For by this lib it is provided that all persons who are poor, impotent & unable to

to support themselves either from a want of understanding, age or infirmity, shall be supported by their Parents or Grandparents if of sufficient ability. This duty is conditional, depending upon the ability of the Parent &c. - which differs from a debt that being unconditional. And as there is no certain limit to the ability of Parents &c to enforce this are also liable to support the aged. 1 Bl 449. 1 Show 190. 2 Ld Ray. 1232-3.

Parents are not obliged to support their adult children if they are able to support themselves either by labour or otherwise; but minors are supposed never able to support themselves, therefore &c. 1 Bl 449.

On the other hand the same obligation lies upon Children & Gr. Children themselves not able to support their Parents & Grandparents if they of sufficient ability & the parents &c unable to support themselves. But if upon hearing before a proper tribunal the children &c are unable to support them, the town must do it 2 Ld Ray 1232-3.

The Eng St seems does not extend the obligation to support their Parents 1 Show 190. 2 Salk 545. Ld Ray 203. 1 Bl 454.

When there is no one standing in relation of Parent or Grandparent, Child, or Gr Child &c the Pauper, the town, or Parish must support him, but you will observe this obligation of the town is but secondary, that of the Parent &c is primary 2 Ld Ray 1241-3 & 1 Bl 447.

Maintenance } The duty of obligation in the
first instance devolves upon those who
in the nearest degree to the pauper, thus up-
on parents & first & if they are not of sufficient
ability then upon the gd parents. But if parents are
of sufficient ability the gd parents are not liable &
so on the other hand the oblign first devolves
upon the childn & then upon the gd childn.

But how when the pauper has parents who
are unable to afford a partial maintenance
& gd parents who are of sufficient ability, I presume
that in such case as the parents are liable in
the first place, they will be compelled to furnish
what they were able to, & the gd parents the rest.
& the same rule and Rod with the childn. but
there is no case of this nature met with which de-
cides the point.

By a man in Com. marries a wo-
man having childn by a former husbd it
seems to be the prevailing opinion that he
is bound to support them, whether the wo-
man before mar. was able to support them
or not. & in return he is entitled to the
services of the childn. But I doubt whether
this is law & I rd not think the usage
sufft to make it a rule - that it is common
practice. 1 Rod 260. Kirby 156.

In Engd is settled & determined
y the acct husbd is not bound even during wt
to support childn of his wife, & it seems to
be

to be so decided without reference to the point whether wife was of ability to support them or not, at the time of the marriage 2 Ld Ray 1454. 1 Str 114. 2 Ld Ray 1540. 2 Eq. Ca. Abr. 76. 166. 1 Bro C.C. 468. 2 Vern 353.

This rule is settled in Eng upon what is deemed the true construction of the St 43 Eliz at uses the words "parents & children", & these are consid. as meaning no others than those of natural relation, i.e. those of consanguinity & not of affinity. The words of our St are precisely the same with the addition of "grand children", & it would seem that our construction was wrong, and I think the Eng. construction is the more proper & more natural one

And in Eng it has been determined that such a maintenance was a legal charge in favor of a pauper by the child after full age, to repay the expences incurred 2 East 76. 1 Selw. N.P. 297.

But tho I consider the Eng. construction of the words "parent &c" as the most natural one, I shd very much doubt were it not for the weight of authority, whether that construction, or our own was precisely such it shd be as applicable to this case, as to the liability to support the child of his wife by a former Husband? By the Eng rules, the Husband is not liable to the wife's ability as they may be, by the law as he is liable at all events. The intention shd be, that if the wife was of sufficient ability to support

[illegible] the [illegible] of the marriage, the Husband be liable, even if not. This ground upon principles of the C. L. & not upon the Eq. The Husband upon the unconditional obligation to support them if the [illegible] marr. the Husd. deprives her of all her prop. or at least all control over it, so that she is unable to support them, Mr J. Blackstone says down the same rule & I think it is the correct one, even in the Eccl. Courts. 1 Hagg. Ecc. 283. 2 Burn. 346.

But it seems to be understood in Eng. and agreed to here, that a man is not obliged to support his wife [illegible] tho' they are paupers. To do this would be to encourage every manifest. for when a man marries a wife who has child. he is fully aware of their circumstances, & is not at all taken by surprise & says the burthen of supporting them is voluntarily undertaken, whereas with parents who become paupers the poverty is usually subsequent, and the burthen is constantly increasing with their age, & domestic peace is likely to be endangered by causing the profligacy of the Husd. — not the policy of the law will not allow; but still upon principles of equity & the Wife has not any property to support, & mind & he shd be liable for their support.

Ld

but this is going further into elucidation than
do any of the cases. See 1 Bro. C. C. 435. 1 Bro.
C. C. 367. Ves. 153.

There is one unpleasant case under this head, which is not decided. It is a case in which a pauper has both parents & children who are able to support him. — The Statute makes the duty reciprocal between parents & children, but I believe it has not been decided to which the preference shd be given, or whether there shd be any discretion taken as to them. There is no Statute of Eliz. which will decide. Others think the preference shd be divided — but it is but matter of opinion.

Though parents & children are obliged to support their paupers, the rule does not prevent a parent from discontinuing any one or all his children by testament or devise; the allegation of maintenance is enforced by the Law only during the continuance of the relation, the obligation of course ceases on the relation's or the death of the parties. 1 Bl. 449. 450.

By Statute of 43 Eliz. if a man die without issue, leaving a widow who is unable to support herself, & who has no estate that can be found by law to support her, this estate in the hands of Legatees &c. is charged with her support during widowhood. 2 Bl. Com. 384. I believe this is the rule.

Maintenance & provision &c. &c. &c. &c. &c. from
Most the claims of the Widow are Paramount
to those of all remembrancer could tender
heir.

The mode of enforcing y^r duty is by Ac. —

In Con. the
duty is enforced agt. Children & the Parents
y adult child." by application by way of
rule to the County Court. — Duty agt y Parents
y adult child" as contrad is distinguished from
those of Minor, because there child" to maintain
their minor child" is by the C.L. absolute, &
an act" of Parliament lie agt them for the adult
aver child", none such for neces^s furnished
adult^s, for here the child" being conditional
the Law does not raise debt & no act" will
lie. The case as to adult child" depends upon
the two fold quest. whether they were able to
support themselves & whether the parents
were able to support them 1 Roll 60. 2 Roll 184.

For necess^s furn-
ished a Minor, an act" at Law as said above
lies agt the Parents, whether he is able to pay
or not, for the child" is unconditional but
strictly speaking it is debt. 2 Bac 3 Ed. 51.

This application
for the maintenance of a Pauper may be made
by any of his relations who are within y^e Provis-
ings for his support, or by the Churchwarden of the Town.
but no provision is made for the Parties themselves
to apply to Con 382.

in a Ct of Equity. Here are made all the relations of the pauper, male & female are ordered to appear before the Ct. & the expence & maintenance is apportioned among them according to their several abilities without any reference to what each may have received of the pauper's estate; Therefore a case, where the father who afterwards become a pauper gave his estate to one son, who became poorer than any of his brothers. Upon application, he was ordered to pay something from any of the other relations of his father.

The proceedings in these cases are in the nature of those of a Court of Equity in Eng. The relations are ordered to give bonds for the performance of the order of the Ct as to paying money weekly — & if no security is given, the Ct will issue process of attachment against them. 2 Ld Ca 383.

2. The duty of protection of Children is required by the Municipal Law, for tho' it is founded upon natural law, yet it is left to the province of enforcing it, indeed it is a duty rather permitted than enjoined by the mun. Law it being presumed that the dictates of nature will induce parents to maintain their children. 1 Bl. Com.

Under 43 Eliz. if parent may maintain & apprentice his child in Law suits without incurring the legal guilt of maintenance, and he may justify a battery in defence of his child

Protection. } child, not necessary an interposition as between strangers, but whatever he may do in defence of himself he may do in defence of this child. 2 Inst 564 1 Bl 450. Bro. G. 496. 1 Hawk 63. 131

and so of more remote degrees of parents & relations a right of protection, & is reciprocal, & common between parents & child. Not is the child may also justify any act in defence of his parent he may justify in his own defence 1 Bl 454.

It is also an established elementary rule of the municipal Law of Nations that parents are obliged according to their ability, to give their children suitable Education. There are two offices for enforcing this by the municipal laws: it is for the moral part left (as it is generally wife so to do) for the parents to conduct it in their own way. In Eng. no other provision for the purpose except that poor children may be bound as apprentices by the overseers of the poor, and persons are forbidden to send their children abroad to be educated in the popish religion 1 Bl 426. 451.

In Con. We have an ancient statute that whereas children are frequently neglected & their time is not of much use or injury — providing that parents & masters shall train their children & servants according to their ability & the laws of the Commonwealth & the laws in fixing a capital

education; capital punishments, if they are allowed it; not, at least, Bread alone or Rhodes Catechism, or on failure to be subject to a fine.

And further we think the enactments to take children from parents who neglect this education, & bind them out that they may be properly educated, males to be bound till 24 years old, & females till 18. — And this till often enforced till 60. —

Records of the law compells the child to pay the parents the duty of obediance, & maintenance in case the parents are in need, under the circumstances above mentioned 1 Bl 453-4.

The Rights & Powers of the Parent over y^e Child

It is a Rule that the parent has a right to correct his own children for a reasonable cause & in a reasonable manner. This right arises out of his duty, for he is bound to maintain, protect & educate them, & this cannot be properly done without the power of government. 1 Hawk 130. 1 Bl 452.

But it is not to be understood that the right of the parent is unlimited, for he has no more right to kill, or outrageously beat his child than any other person. He for a duty & a trust. The limits of this authority given him by Law, he is criminally, as for an error in the judgment as to the degree

Punishment on the [illegible] degree of punishment for the power is for the most part discretionary, and indeed to subject the parent, the rule seems to be that the chastisement must be both un reasonable & malicious 1 Hawk 3-4. Reg. 65.

This power of correction the father may delegate, for he has a right to bind out his child to a master, & as he has a right to create this new relation of Master & Ser. he may confer upon, & master that power are, which he has given him, by Law for the purpose of domestic government. & which is necessary for the master as for a father. 1 Bl 453.

The parent may contract his minor child with respect to his marriage contract, & by the Eng Law as well as our own, the consent of the parent is requisite in most cases of the minor has one, & if by the Eng L. without such consent the marr is utterly void, & the issue of course illegitimate are not Bastards [illegible])

By our L. this consent is required, but a marriage without it is valid, but the Clergyman, or Magistrate solemnizing the marr. is liable to punishment. R. Con 495.

A Parent has a control over his minor child estate except as trustee or guardian & in that capacity he is liable to account for the profits & disbursements, when the child comes of age

age, or at the time may be, before he attain that age, for the further & non compleat time & amount of any term / Bl 452-3. as per Coff. Book of Ju. Dec. &c

A Father of a child is entitled to all the Profits he acquires otherwise than by his services, or the avails of his labour, — these belong to the Father & he may sustain an act. for them, but as to Profits acquired otherwise by the Minor child as by Legacy, gift grant &c he (Bing.) has no more right than a Stranger, except as for as he stands as Guardn. but this is a mere naked one & he has no manner of beneficial interest in the Profits. The reason the Father is entitled to the avails of his child's labour is that the child is considered as act. to the Father, with the exception of the particular cases of emancipation &c. 1 Bl 453.

It is upon this principle that the Father is entitled to the service of the child that he can sustain the act. Per quod servitium amisit, act. any person who has or hires for a time the service of any person may enjoin the child as to occasion a loss of service, tho' free and hire nevertheless in the character of Master &c. not immediately in consequence of the relation of Parent & child the ground of Parties stay Mast. 2 Bac. Abr. 9 Com. Dig. Pleas D 64 5. 1 Bl 453

Hence also an act. per quod inlic lies by Father for enticing away his infant child, for as it may

(Per quod ser.m amis.) taking the child from the service of his father. Bark. Ca. 233. Mont. & Dev. 60.

Plea &c. that
boy been beaten & otherwise personaly injured, the Supp.t only is entitled to d.mages for the immediate injury, that the father is to the consequential. Bro C. 55. Esp D 626.

And if in con-
sequence of any such injury to a child the
father has incurred any expence as of Surgeon
for curing the wound &c. he may recover expences
as prov.d he alledges it specialy as a
ground of damages, but not otherwise, he
cannot recover under the Per. quod ser. am. unless he adds - "& also &c" 3 Wils 18. 2 R 459.

Upon the same
Princ. ag.st an act.n Per quod ser. am. lies by
the father, for the seduction of his daughter
In this case as in those above the gist of service
to the gist of the act.n; attempts have been
made within a short time past to liberalize
the Law so as to enable the father to recover
without alledging loss of service, but was the
original & most ancient form of action 2 Roy
1092. 3 Bur 1878. 2 R 166. Bro C 764. 11 East 24.

And in pl.t & parent may also recover for
any expence incurred during the daughters
illness provided as above he alledge it
in his Decl.n as a third ground of damages. for
he must give notice of all the grounds, on

with the claim Special Damage Bay 269. 3 Wils 18.

But if Loss of service be in strictness the ground of action is not the real or principal ground of Damages, but the real ground of Damage is the injury done the person injured, & the injury done the affections & character of the family, yet these are not sufficiently definite in their nature to be the ground of action tho the aggravate the damages after enormously 3 Wils 19. Lowes 67. 5. 11 East 23. 8 & D 625.

On a subject of the Proposition that the Loss of service is not a ground of Damages, I observe that evidence of the slightest service performed by a Daughter for her Parent is sufft to support the action & that it is not necessary the damages should be in any degree proportionate to the loss of service 3 Wils 19. 1 BR 268.

And further if action will lie then in a Summary point of view, the child was a burthen to the Parent, or was of no service to him & will lie as well for the labour of a Gentleman as for that a Labourer, indeed the Damages are gen[erally] greater in proportion to the work the service is in the inferior ratio. Bulls Cases 78. The character of the Daughter to Chastity in fact is given in evidence to determine the amount of Damages, as if any evidence was given to impeach her character it will go to their mitigation, a decisive consid[eration] that the loss of

[illegible] of service is not the ground of damages. For the service of a daughter of bad character may be strictly one of as much nature as those of a daughter of good character.
Peak. Ca. 39. 240. 3 B & P 27. 1 Root 492

But as of Parent is here the party recovering, the misconduct of the Parent in relation to the contract of the parties concerned in the transaction, will go in mitigation of damages. It ans.

I have already remarked that if act will not lie unless the daughter has been in some way the servt. of the Aff. But a slight evidence in this case and a modern ruling has in effect very much lessened the consequence however light the service may have been. Lord Kenyon has lately held that it was not necessary to prove she had actually laboured in the service. For the least service was sufficient.

But in case of the seduction of a minor child there is no necessity of proving service, for it is enough that she lived in her father family, a subordinate member of it, & subject to the father control. & this Note to be of three weeks, for she is in such case considered as his servt.; for he has a right to command her service whenever he pleases. Peak Ca 55. 238.

The age of the daughter is not a vital material if she was living in father family as a subordinate member of it, and if an adult subject to father domestic

domestic control, In such cases there is no need of proving any contr. of service for the relation of Parent & Child is not dissolved by coming of full age, for if she continues with the father after coming of age, she remains his Servt de facto. for as ala. above the relation of Master & Servt arises out of y. of Parent & Child 2 Wils 18. 2 BR 1166. 6 it 252. 1 East 525. 2 it 275.

But if y. daughter was under age at y. time of the injury done she is to be considered as a Servt to her father, unless she served another without wages, or with wages & received them herself for if serving without wages she is not for the time being to be considd as Servt to her father & if with wages & receiving them for herself she is considerd as so for emancipation.

But it is said by Erskine in his Digest, y. act of Service cannot be sustained unless the daughter was actualy residing in y. family at y. time of y. injury done, but the case he quotes does not authorize him, or is there any rule laid down by L.d Mansfield, who says down no such rule neither is it to be found in any of the books, suppose a child is at a boarding-school, or labouring for another to her fathers profit, she is under his protection, & y. undue age is no considd unless emancipated. The rule does not hold where the claims of another exclude the father

Esh D 645. 3 Esps 45. 2 Selw. N.P. 1084

Per quod servit. amis. } It is also laid down by Esp
on the case of D. Manfield, that the daughter
must have been a minor, but this is a great
mistake, for there are cases in wh the act. has
been maintained by the Father for an injury done
to a daughter of 24. & 30 years of age, & it has since
the last century & 3 Mod. not been when there
ever has been a doubt but the act. may be
sustained Esp D 645. who quotes 3 Bac 1878.

The act. may be brot not only
by the father but by the mother after his death
& indeed by any one standing in loco parentis

There is such a thing as adoption
of a child, And if a person adopts a child of an-
other & it may be done by merely assuming or
acting as if in relation, - that person stands
in loco parentis, has all the privileges of a
parent & is entitled to the act. for seduction.
In a case of this kind it has been decided that
Parties stand in relation of parent & child
& from this arose the case of Macfarl. & Lut. 2 Str 824. Selw
Ca. 55.

In these cases of Seduction the daughter
herself is a competent witness, - the rule
is not founded upon the ground of necessity - but
on the ground that she is not interested in the
event of the prosecution 3 Wils 18. 1 Root 472.

In an act.
for seduction merely, laid with a loss of service
it sounds entirely in case, & is on this principle

principle & think it should be, but in Eng the actual form of the act^n is accepted. In Com. however we always bring case, — as it ought be. Thus if an injury is done a Lest^r of Martin for the consequential damages brings this on the case, but the Lest^r himself for the immediate damages brings this, submitting to reduction the costs authorized by case. 1 BR 169. 2 Ray 1032. 1 Ld. 5 BR 361. 2 Mod 282. 6 East 388.

But that the usual form is by plaint see 3 Wils 13. 3 Burr 1875. 2 BR 4. Bac. Ab. 203. 246. 2 DR 475.

But when the act^n is laid with an illegal entry of plaff's house & the subsequent injury to his daughter laid under a per quod, the act^n as nice in substance as form is an act^n of the p^r. 2 BR 167 &. 2 Ray 132. Sal 206. 642. 3 BR 292. 1 Mod 556.

Because the gist of the act^n is the illegal entry of plaff's house, & consequent injury to d daughter being a continuance of the offence, is but matter of aggravation, & must partake of the same nature ib. case.

But when the injury is thro' a license to enter the house defeats the whole act^n for the entering the house is the gist of the act^n the rest but matter of aggravation, & any defence wh is sufft for the gist of the act^n is sufft for the matter of aggravation, & covers the whole — This thro' is the most dangerous form of act^n & best for every plaintiff's case, & no particular advantage arises from

(Per prad) from it, for there never was a case in wh the damages were increased in consequence of the entry illegal, unless some great damage arose from the breaking, & this act. is more difficult to prove & more easily defeated 2 BR 166.

In Civil System it is invited that a license in such case is no defence, because the subject has made itself a Trespr ab initio, but this is altogether opposed to principle. — When the Law gives a man a license & he abuses it he is considered as a Trespr ab initio, for it will not suffer that license to be abused & will punish him for a breach of the tacit condition annexed to that license, thus if a man enters a tavern & breaks the furniture, he is a Trespr &c. but with a private license the law is different & the subject Trespr. does not alter the character of the original entry 2 Lutw 64. Peak 191. 6 BR 1466. Cyclo 967. 2 BR R 1218. 5 Da 161. 1 BR 12

It has been a question which opinions are divided, & wh I believe remains to this day unsettled, Whether a Parent can maintain an act. for getting away his child, without alledging loss of service or any other special damage, I should say the act. and the Trespr is of more liberal extension, but judgement of case is against. It is however an agreed point that by the feudal Law, the man who maintains an act. for getting away the heir apparent, the ward on the part of the ancestor was entitled to retain him from the other party on his heir marriage; But at the present

regard to taking away younger children. The parents
discretion better as to the education and management
of such of them as said. Granville says the action
will lie for the parent has an interest in all the
children to provide for their education. Cro E 770.
3 Co 38 b. 3 Bl 140. 1 Bl 452, 3 Burr 1879. 1880.

The authority
of the Father ceases it is said when the child at-
tains the age of 21 years. for then the child is said
to be emancipated — but this is meant merely of
that he is entitled to emancipation, & exemp-
tion from the control of the Father, if he choose
to claim it. — but this is not often done, for
most children live with their parents a length
of time after they attain that age. & if they do
continue, they continue as servants de facto
to their father — & that too without any
contract. In such case there is no actual
emancipation & it is on this point, that the fathe
is called to maintain an action for seduction of the
daughter who is above the age of 21. and on mar-
riage continuing with the father, obtains a
nonsuit in that action with 2 nominal costs
the reason of full age 1 Bl 453. 6 T.R. 252. 1 East 548
2 Bl 296.

The Mother as such has no authority over the
children — but only what is derived from the father
& he may prohibit, or he has strictly a right to
prohibit the Mother's exercising any authority
I dont mean by this that she is liable for a breach

Parent & Child. } the Father, & the exercise are
but she is considered as acting merely by the au
of y^e Father either expressly or implied, & when
the Mother does exercise this authority, as
is the case in most of our ill regulated fam
ilies, it is from the implied assent of the Fa
ther — I am now speaking of the au of
the Mother during coverture & the strict the
ory of the Law 1 Bl 453.

... for which are made liable by the act of their Children.

There are three
particulars which regulate the Law on this point

1st A Parent is liable for y^e torts of his
child^n learned while they continue his ap
prentices as a Master is liable for the torts
of his Serv^ts. And otherwise for the Father. Indeed
he is here liable not in the character of the
Parent but in that of Master & the Law knows
no such thing as making the Parent in those
cases liable as such. see Ld. Raym & Ld^d &
many more cited.

2^d The Father is no more liable
on the contr^s of his child^n than a Master
on those of his Serv^t with y^e except^n of those
for necess^s furnished to them. A Master is
not bound to furnish necess^s for his Serv^t but
a Parent is for his minor child^n & in certain
cases for his adult, or next in kin for necess^s
He is liable as Parent or otherwise as Master, see

acct. but must & sue in a suit in.

Under the Con. St. however a rule is introduced, totally unknown to the C.L. & providing that if an Infant is permitted by his father, to contract for himself & in his own name, he shall be bound by the contr. & not the child, precisely as the Master is bound by the contr. of his Ser. under the same St. The C.L. extends only to those contr. made for the Father by his exec either express or implied St. Con 295

3. In certain cases under our Laws & Laws, the Parent is alleged to pay the fine inflicted upon his infant child, for offences committed by them. There are offences which are presumed the Parent might have prevented the commission of, by proper domestic govern. as for a breach of the Sabbath, refusal to work on the highways, — on which infants in certain cases are obliged to labour — & for non-equipment or non attendance on Militia duty, but no other punishment, than a pecuniary fine is inflicted on them. — This is unknown to the C.L. There every Man, Woman, & Child must answer for their own offences — St. Con 308. 9 Wend. 370. 228

The diff. kinds of Guardians. There is a diff. & distinct

Testamentary Guardian

& sometimes defined to be a temporary Parent

Guardians } or in other words a person stands for certain purposes in loco parentis during the child's minority — Sacy for certain purposes. for a Guard.n is not for all purposes a temporary parent. And a person under the charge of a Guard.n is called a Ward 1 Bl 460.

In both Eng. & Com. the Guard.n has the charge of both the person & the estate of the Ward all that by this is meant, is that the person & estate of the Ward are subject to some Guard.n tho. the person may be subject to one & the estate to another man 1 Bl 460.

All the kinds of Guardians are four. 1st. Guardian in Chivalry, this kind of guardianship took place only when the est. was holden by Knight Service, vested in an Infant by descent — it ceased when entirely from the time & vested in the Lord of the reginion it continues over Males 21. over females 16. or marr.e and did not extend over the estate of the Guard.n was not accountable for the profits of the land in the mean time indeed it seems to have been intended for the benefit of the Guardian; It was also assignable. As to the profits all were there Guard.ns com.on law that there a case of Horse, Sing given for one of them, These were abolished at the restoration 12 Car 2. to get the wills the military tenures &c. not they were supposed. In this country there never was an inch of land holden

holden by the Crown of course we can have no such guard.ⁿ but as a Guard.ⁿ in Chivalry 1 Inst 88 n.11. 2 Bl. C. 87-8. 99

2.ⁿ Real kind of Guardianship by Nature, This kind of guard.ⁿ has been very much misrepresented, & there is a great deal of needless confusion with regard to it in the books for the subject is very simple & elementary Some of the books limit it to the father alone & come to the Parents, & to none others. but so is incorrect. for the Father, Mother & any other ancestor may be y Guardian, but the claim of the Father is prior to all others, then the Mother, &c. & when there are two who claim by equal rights, as the two G.ᵈ Fathers, that ancestor has the preference who first gains possession of the person. 1 Ves. Sen. 3 Co 38a. 1 Inst 88b. n. 12.

The Fa.ⁿ by nature has no acc.ⁿ except over the person of the Ward, & has nothing to do with his estate the office continues no till the ward is of age 21. — but the same person in diff.ᵗ capacities may have charge both of the person & of estate

Ag.ᵗ extends only to the heir apparent to the ancestor or Guard.ⁿ himself, & to no other child.ⁿ whatever. By "younger child.ⁿ" is meant any other than the heir apparent, so that if a man had several daughters & then a son, born the daughters will become younger child.ⁿ & never become subjects of Guard.ⁿ by Nat.ᵉ because they

Guardians } They are not heirs apparent. for daughters are never more than presumptive 1 Bl. 3 & 6. 1 Just 345. & 6. n. 12.

In Com. L. Children throughout the Kd. all the childn are heirs apparent, of course this all a mans issue in the county may be subjects of the Guard. by Natr.

But in Eng a father may supersede the Guard. by natr. & indeed all other guardianships whatever by appointing a Testamentary Gun. under the St 12 Car 2. & it may be done either by Deed or Will, — No such character is known to — N. C. L. 1 Just 88 n. 88 n 14.

In Eng as well as in this county, the Parents are styled natural guardn. of all their childn but as the term nat. Gun. is technical it is incorrectly used in Eng. for no one can be nat. Gun. except of his heirs apparent. But as the word natural is thus correctly used all that is meant by it is such a person as the Law of nature designates as the proper one, And when the Law appoints no guardn. the Chancr. as discretion may & will & constantly does assign the Guardn. upon the Fathers, & on his death upon & Mothers, & nothing inequitable appears to prevent it. In this county the expression alone carries a proper meaning, for all the childn are heirs apparent, consequently the Parents are nat. guardn. to all their childn. 1 Just 88 note 12. —

3d. guardianship in Socage. This like Guard.p in Chiv.y is founded on Tenure, & takes place only when Inh.t under 14 years of age is seized of lands, devised by Custom or held in Socage Tenure 1 Inst 87. 8. 2 Mod 146. 1 Bl 461.

This Guard.p belongs to the nearest relation of the Inh.t to whom the lands cannot possibly descend this is made up of a branch of Trust 1 Bl 461.

2d. It extends to the Person of Ward, Socage as in Corporeal Hereditaments & it seems also to his personal estate, generally speaking & accordg to the Person drawn after in Trust of every Species of Prop.y but not as here 1 Inst 87. b. 89. a. 13. 1 Rol 46. Hutt 97.

But it is not Equally like the Guard.p in Chiv.y, the Guard.p in Chiv.y were entended for the benefit of Guard.n & is pure kind of trust for no profit. But 3d. in Socage were entended for the sole benefit of the Inh.t & personal Trust in Guardn of Guard.n so that he cannot transfer it. il. acc. 1 Abow 298.

It ceases when the Inh.t attains the age of 14. at which time the Ward may enter upon the lands & oust his Guard.n, & the latter is accountable for all the Profits wh have accrued during Guard.p. The general received opinion only is in cases at 14. is that at that age he may chuse his Guard.n for it is not meant that at the age of 14. he ceases

Guard.ps } ceases to be a Guard. but this Guard. gives place to another Litt. sec 123. 1 Bl 461-2. 2 Ba 87.

This Guard.p like all others may be superseded by the appointment of a testamentary Guardian under the St 12 Car 2.

5th Guard.s for nurture

This is the Law only when there is no other Gu.p appointed by Law. It extends to Child.n who are not heir apparent ie. to young children. & until they are 14. years of age 1 Bl 461 3 Bac 98. 1 Inst 88 m. 12. 8 gn 13.

This species of Guard.p can be exercised only the Father or Mother of the Ward, & extends to no other ancestor or relation whatever.

Reason that the guard.p by Law. nurture only to the younger Child.n & never to the heir apparent, for there is no mid father or Mother to whom the guard.p for nurture to the heir apparent; for they are guard.s to him by nature, wch is more extensive, continues longer & is more valuable 2 Litt 14. 1 Inst. 8 gn 13.

From thence we conclude there can be no such thing as a Guard.p for nurture in the Law for then all the Child.n a man has are heir apparent

6th Testamentary Guardians. By St 12 Car 2. a Father may devise the custody of his Child.n if under the age of 21 years by deed or will, attested by two

two witnesses, appoint a Guard^{n} for any or all of his child^{n} who are infts & unmarried - & even to an infant unborn, - & the appointment may be to rest either in fee^{s} or remainder so as to guard against any contingency of his child^{n} being left without a guard^{n} of his own appointment or selection. as an appointee of Ch^{s} as a guard^{n}. & if he dies before his child^{n} are of full age to B. &c. &c. And it may be made to continue until the child^{n} have all in succession attained full age, or for any less term, or over some child^{n} & not others, or diff^{t} guard^{n} to diff^{t} child^{n} &c. This Guard^{n} supersedes all others & differs the person & all the bro^{s}. & excludes a testamentary guardian. In Eng we have no St authorizing such appointments but I suspect however, that Guard^{n} is known to the Ct. of Chy. 1 Bl 462. 1 Dick 703. 2 Ves 190 - 2 Wils 129. 1 Swanst 89 n 15.

6th There is a species of Guard^{n} who is entirely unknown to our law created by St 4 & 5 Wm. & Mary. It is appointment of daughters or females alone & continues only till they are 16 years of age 1 Swanst 89 n 14. 2 Ba 675.

7th Guard^{n} by Custom are known to the Eng Law, but with them we can have no possible concern, for we have no customs therefore we pass them without further notice. see them 1 Swanst 89 n 15.

Guardians

There are certain kinds of Guardianships still remaining not enumerated by any of the old L. L writers.

1st. are by election of the Ward. It takes place only when there is none appointed by Law & there is no testam.ry Guard.n appointed. For notwithstanding the seven kinds of guard.n above enumerated, I do easily suppose a case in which an Infant of 14 years may choose a Guardian, even if none of the seven are now considering, Viz. If without lands by descent held by Knights service — no Guard.n in Chiv.y, & none by socage tenure, & having Estate was above 14. — no Guard.n in soccage, Not heir apparent — none by Mat.e — No father & Mother — none for Chattels & with no testam.ry Guard.n; he is without any aid in such case in the County Court & then & there may apply & pray it, & such case this elec.n is provided. It is a Provision of late origin & seems to have been introduced about the time of the restoration (1660) Tho' it was somewhat known about before 4 Inst 84 & 1 Rep 375.

There appears to be no specific mode in any point out by Law, in wh. election is to be made the Mad.e is to make it before one of the Judges of the circuit, & I suppose he makes a memorandum of it. Sometimes however it is made by Statement out of the Minor's mouth as in the case of Lord Baltimore, who appointed

appointed his guard^{n} by deed. It is not said but y^{t} the appointment might be made by Will. There is no law deciding the point, & should however hardly think so loose a mode would be sanctioned. 1 Inst. 89. n. 16.

In Eng. the age for choosing a guard^{n} is 14. in both sexes. In Scot. it is 14 in Males & 12 in females. Thus in Eng. the age does not seem to be precisely settled, for it is said the choice may be made before 14. as well as after, — nor could it may be made after 14. but as to an earlier age it is not certain. 1 Inst. 89. n. 16. 1 Bl. 463. 464.

2^{dly}. There may be a guard^{n} by appointment of y^{e} Chancellor there are also of modern date, but Ch. has exercised the power for more than a century past. Fitz. 89. Reb. 172. 1 Bro. P.C. 544.

The Lord Chancellor however never exercises the power, when y^{e} infant is otherwise provided with a suitable guardian, but when he is not provided with one at all, or not properly provided. His jurisdiction of Ch. is very extensive. It extends to the appointment of new guard^{n}, & it may remove any guard^{n} appointed even the Father. Prince of Wales 1 Vez 160. 1 Bl. 463. Ex. Ch. 105. 1 Bro. P.C. 103. Lee 44. 1 Ray 486. 1 Pa. 579.

In Eng. the Ch. of Ch. exercises none of these powers, but similar ones are vested in our Prerogative Ch. alias Ch. of Probate. And in other states I presume it is regulated by St.

Guardians

Eccl. This agt. avers that Guard. may be appointed by y^e Ecclesiastical Cts. The Cts. have claimed a right to appoint a guard. as well over the person as the estate of the Defts. but this right as for as it regards the Defts. person has always been denied, & lately their right as to ^the^ estate has also been denied — They have Bac. Abr. other powers than to appoint a Guard. ad litem. 2 Ba 679. 2 Rol. 364. 3 Burr 1495. 3 Atk 631 1 Burr 131-2.

4th and lastly. There is a double sort of Guardians viz^t Guard. ad litem. One is a special guard. appointed for a parti^r suit, or any number of suits in wch an infant is deft. & has no gen^l guard. who can answer for him in Ct. He may be appointed in any Ct in wch an infant can be sued, this is necessarily the case, for otherwise justice cd not be done as judgt cannot be rendered either for or ag^t an infant unless he appear by guard. 3 Bl 427. 2 Lev 105. 5 Co 53. 2 Ba 580.

This Guard. is sometimes appointed by the Crown & sometimes by the Chancellor as representative of the crown & exercising its prerogative, & it has been the prac. of Ct to appoint a Guard. for the suit, but the Crown is not bound.

I do not know precisely how many diff. kinds of Guardians there are. Statutes but I presume they are much such as are in Connect.

We never had any land held in the county by the tenure of Knight service or socage, than can lend much guard: with us arise from this tenure. And it may safely laid down that none of the kinds of Guard: which arise from the feudal law, or from the Eng. customs, can have exist. In fact we have no Ld authorizing the appointment of such Guard: & the L. knows no such character. Neither are Guard: appointed in the state by the Ch. but possibly this may be done in some of the other states where they have a chancellor, And there certainly more ever appointed by the Ct: for no Ct: in this country has any civil jurisdiction.

Even of the different species of Guard: the law of above are unknown to Com. & since to the U. S. generally. Three known are three: 1st Guardians by Nature, 2d Guard: by appointment of the Ct of Chancery. & 3d Guard: by Stat. none other I trust are known in Com. & possibly to none of the other states

Guardians for Nature cannot exist here for it extends only to those child: who are not heirs apparent, & all a mans child: in this country are his heirs apparent. The Mother is sometimes called Gu: for Nature to her child: since till they attain the age of 7 but it is in correct language she is, as things now stand, Nurse.

Guardian: by Nature, here just refers to the father & continues until the child, 21. —

Guard[n]. [illegible] & tending over all the child[n]. he has
& this as much over their property as persons.

On the death of the Father, the Mother is commonly act as Guard[n]. but not so by strict right
for under our laws another guard[n]. may be appointed during the life of the Mother without removing
her by proof of law. wh. is not to be done if she was
guard[n]. by right, this exclusion of the Mother is in
consequence of the phraseology of our statutes
which mention the Mother. St Com. 473.

As to the Female child[n]. it has been determined
that after the Father's death, the Mother is Guard[n].
to them until they arrive at the age of choosing their Guard[n].
— this construction cannot be founded upon the
St. for the St. gives Guard[n]. & makes no such distinction between the Males & Females. 1 Root 131-2. 2 id 328.

But during the life of Father, no other Guard[n].
can be appointed except by removing him, wh
can be done only for some special reason shewing his disqualification St Com. 473.

It is a proof of that the Mother is not Guard[n].
of right, that during her life, the Ct of Prob. can
appoint another, & she frequently the person
appointed. 1 Root 131-2.

Our St. rule is that if the
infant has no Father, Guardians, or Master. It shall
be the duty of the Ct of Prob. of that district in wh.
the Infant resides to appoint a Guard[n]. for them. If
he is of the age to choose, he must be summoned & appear. Female [illegible] of such age to be so

to have for his ward". This choice will be regarded tho' it is not conclusive - it does not compose the Ct. for another may be appointed & will be so appointed if the person chosen is not in the opinion of the Ct a proper person. Swan's Stat. 391 Swan 373.

If the Chft. on summons neglects to appear, or on appearance fails to choose the Judge will appoint at discretion. it. Sh. 373.

If the Chft is under age of choosing the Judge may make the appointment without a summons of Chft. But if the Father is dead it is not usually done without summons of the Mother, unless upon special application.

The Cts. of Chy. have the same nearly if not quite the same power of appointt. of Guard". that the Chan. of Eng. has. And also with regard to removals, for this Ct may remove any Guard". even the Father, finally, for, the words of the St are general "And so often as there may be occasion the Ct of Probate may remove Guard". " It is a decision of long standing here also to appoint a guard". Swan 373. 2 Root 322.

Under the former Settlement Law of Con. it was determined, that a ward might live in the same town with his guard". tho' the town was not his settlt. & he could not be ordered back to his own settlt. He however gained no settlt. by residing with his Guard". 1 Root 131-2. 2 ib

Guardians 2 id 320. Refer to these cases, for it seems to me they will not be law under our new St. to Inhabitants. Under the old St. the town had a right to remove persons who were likely to become chargeable, & might remove any time within a year after their coming into the town; but by our present St. they cannot be removed, under the new law they cannot be warned to depart, until they become chargeable to the town where they are residents. — But may be removed as soon as they become chargeable. — Whence I conclude that a woman who is a pauper may be separated from her Guardian & sent to the town of his or her settlement. — A settlement under this St. since acquired by six years dwelling &c. &c. — But a woman never attains a settlement by having married Guardian 1 Root 191-2. 2 Co. Com. St. Inhab. & Settlem. 169.

In this state, also if a Guardian [illegible] who is under the age of choosing, continues his Guardn. of course, until the age of 21. unless is another is appointed thereby 252. 286-7.

The Ct of Prob. are required to take security of every Guardn. for the faithful discharge of his duty, & if the ward have an estate, the security must be taken in behalf of such. & the Guardn. to account with the Ward when of full age or with the Ct. at any time before that period, if required. — Stat. Con. 392. 456.

But a Guard.n thus appointed is not liable to be sued by the Ward at Law, while he is a Minor, unless called upon by the Ct. of Ch. 1 Root 51-2.

By the C.L. & also by the Eng Law of Equity, all Guard.ns are exempt. Those in Equity are compellable to account for all the Prop. of the Ward which is in their hands. And the Guard.ns in Chiv.e being now abolished, Female & Lunatic Guard.ns of every description 1 Inst. 89 m 9.

The usual remedy to bring a Guard.n to Acct. is by a bill in Ch. the Proceedings there being far more extensively remedial than in actions of Acct. at Law, for at Law the Party cant be compelled, as in Ch. to produce Vouchers, or to produce books, &c. &c. and indeed inferior are the Guard.ns at Law to those of Eq.y That Court has been two or three centuries at Law during the Interregnum 1 Bl 463. 1 Inst 89 m 9. 2 Bac 679 [illegible]

In Eq.y on the contrary, the usual remedy is by an action of Acct. at Law. For there under the Proceedings are as remedial, as a bill in Ch. in Eq.y, indeed the Ct. of Chancery have expressly given to them all the Powers of Ct. as to other actions in Com. Law.

If it appear that the Ward's estate is in danger of being squandered through

Guardian } through the insufficiency of the Guard.ⁿ
he may be compelled to act at any time. 1 Eq. ca. abr.
261. 2 Mod 177. 2 Ba. 99.

In case of any misconduct on
the part of the Guard.ⁿ the Ch. of Eq.ʳ in Eng. may remove him, & if they are apprehensive that he will
misconduct himself they may order him to give
security. & in case of failure remove him; indeed
in such case the acts of discretion, as Paramount
Guard.ⁿ of all the minors in the Kingdom. 1 Eq. ca. 261.
1 P. Wms 703. 1 Bl. 463. 1 Vern 442. 1 Vez 160.

The Guard.ⁿ as such
is bound to compell or maintain his ward at
his own expence. But when a Parent is Guard.ⁿ
they are then bound, for as absolved from their ob-
ligation to maintain their child.ⁿ as absolute
& unconditional, they of the Guard.ⁿ ship
a Parent may apply the wards est. to his main-
tenance. In case the Parent is not poor, the
ct will not exercise a discretionary power. 1 Bro
C.C. 387. 3 Atk. 399. 1 Vern 255.

If then a Parent being Guard.ⁿ to his inf.ᵗ child
omit of ability to give him the education, his
estate is entitled him to. by application to the
ct. of the ward's estate may by leave apply that to the
child to this effect is due.

But by a rule above, if a Widow marries ag.ⁿ
she is not obliged to maintain her child.ⁿ by a for-
mer husb.ᵈ the Marriage of Guard.ⁿ is permitted to
apply the estate to their support, for a Marriage

the Ward. ad be burthened, — wh the Law will not allow 1 Bro Ch 268. 1 Ves 260. 1 Bern 263.

It has indeed been said that for any thing more than necessary & ordinary reparations &c. the Trust estate may be applied, if the object was advantageous & the expence reasonable; so to obtain a place as an apprentice. But this is denied by L. Hardwicke & says the estate shall not be applied for any such thing 1 Ves 353. 2 Ves 157. 255. 3 Atk 699. Bern 196. Now if I was allowed to indulge a little in speculation, I should say that neither of these rules was the true one, for the ability of the parent & child are considered in neither & it seems to me that the Ct should decide upon the circumstances of each particular case, & Ct has power enough to settle the estate as it pleases. — The rule requires qualification

Con: Con: when the interest of an Infant Mortgagee is decreed to be reconveyed on a bill filed for redemption, the Guard: is injoined & do it under a penalty. & if he has no real Guard:, the Guard ad litem, for that purpose must also be compelled to reconvey — & the reconveyance will be valid — Ch Con 222. But I do never see the necessity of this Ct for an Infant acts in pursuance of a requisition of Law were by the Ct valid, & therefore he cannot act in pursuance of a decree of Ct. 4 Ves 1794. 1 Ves 465.

So also by our Law, the Guard: of an infant

guardians & trust. heir of a deceased joint tenant or tenant in com.ⁿ is empowered with the assistance of such persons as the Court shall see proper to make partition, & the partitⁿ shall be valid — But as L.L. the Infᵗ has a right & so this but the object of the Act seems to allow the Guard. to make a voluntary partitⁿ wᵗʰ the heir Edwards 96. Lt Com. 237. that the heir may do the same thing. see 3 Burr 1601

And it seems that the Guardⁿ in Eng. may bind the ward by an agreed partitⁿ, & so in and his brethren ami may do the same thing & this appears to be the rule of Eq. 2 Ba. 604.

Bol. 256.

If the Guardⁿ of a Ward enter upon a compromise with the Guardⁿ a less sum than is their due, the ward & not the Guardⁿ shall have the benefit of it for the Guardⁿ shall not dictate upon his wards purp. it is his duty to pay the debts & he shall not become a purchaser of the debts & then at a discount & then upon them to the debtor — So. Eq. the debts he is entitled to and for the ward & it and he a trust of Lands, then to speculate — 2 Ba. 607. 2 Ch. Ca. 245.

You will perceive from what has been said of the Guardⁿ & ward in as much as the Guardⁿ & ward. and if a stranger fortuitously enters upon the Wards land & takes the rents & profits he is compellable to act as Guardⁿ or trustee to —

to the Trust or he may be enjoined as a Trustee ad ma[illegible]
education of Ward — This not so in any other case
for if he had entered upon the est of an adult
he wd be liable only in Trust 1 Ex 464. 9 Mod
436. 2 Vt 295. 342. 2 Ba 687. 1 Eq. Ca 280.

And the rule is the
same in this case if the money does not continue
in Guard's a number of years after the Ward
came of age, In this latter case he wd be entitled
to act as Trustee for the whole time the Money
is, for he was originally liable to be thus treated
and as a Trustee he must continue the same and
the interest a right to the same remedy. ib. acc.

If Guard has
money of the Ward in his hands & comes an
account upon act. allows interest for it, unless
he can shew (such is meant to impose diligence) that
interest cd not be obtained 2 Vez 627.

If Ward is
in debt & they are charged upon his estate, & the
Rents & Pers. Prop. in the hands of his Guard's, it is the
duty of the latter, & apply that Pers. Prop. & the
Rents & Profits of those debts & not pay them with
his own monies, to preserve the funds for
Ward, for if the Guard's advances his monies, in-
terest will accrue agt the Ward which it is
the intention of the rule to prevent 1 Ch. Ca. 55 6

If the Wards
estate is a Rent &c, the Guard's ought to apply the
rents & profits of it, first to the [illegible]

Guardians interest & then to the Principal &
Power

A Guard.n as such has no power to real-
ize the Ward money in Land, but if does
it & take a Deed in Ward name the Ward
on coming of age may either take the Land
or the money with interest at election,
If he takes the money however, Eik will com-
pell him to convey the Land to his Guard.n,
Vern 435.

But if an infant dies before
making his election the heir cannot take
the Land but his Ex.rs is entitled to the
money, for this right of election is a chat-
tle personal & is not Barr.ble Vern
435. 436. The reason of this is, that the Land him-
self was entitled to go to the heir & her estate
therefore he may act his pleasure as to elect
but on his death, the heir & Ex.rs have conflict-
ing claims, the one being entitled to the real
the other to the personal estate. Therefore as the mon-
ey was invested in the Land was then the Court
in this case consider it as in its original state
& give it to the Ex.rs of Ward.

The Guard.n in gen.l in any
inviting for Ward money is not entitled
to buy more than the Principal & interest
But if the estate was directed to be invested in
the funds & the Guard.n neglected it is a gain-
ful case, & he is made to account for

of age take either what the Lands and have yielded, or the profits of the Land. - For Guard. here is considered as agent for the Ward & will have made him a reasonable allowance for trouble & labour. — He acts only in character of Bailiff. 2 Vez 629.

Wt. Marriage of the Ward, the Lord Chancellor of Eng. exercises an authority never claimed by any Chancellor in this country, certainly not in Com. Thus. the Chancellor will by an injunction forbid the marriage of the Ward, with, or without the consent of the Guard. This is done for the protection of both parties. & for a breach of the injunction he will punish any person for contempt with Ward, Minister, & family engaged. Ballow 58. 2 Atk. 562. 1 Vez 160.

Whenever there is an apprehension of the Ward marrying improperly, the Chancellor will issue his injunction - & if necessary confine the Ward & then punish the family for contempt of court if all are [illegible].

In Com. Eq. usage the Guard. may bind his Ward as an apprentice of the think proper.

We laid down as general terms that the power of a Guard. over a female ward is determined by her marriage, but this is not to be taken with respect to her property unless her husband is of full age, this is so as to her person. For the

guardians & the ward's own spirits is not absolved from the power of the Guard'n unless he is of full age, & he cannot make any contr. for the ward while he is not made for himself. Nor is any of any act for his use, he may do for himself. Dod the is undoubtedly emancipated from all parental control 1 Wilg 91. 160.

Settlements of Minors & Infants.

The Law of Settlements does not appropriately fall under this title. But as there is none to which it bears a nearer relation than it does to this, we may say that of it here.

In Con. it is regulated by several Provisions, wh are divided into three distinct heads. 1st Relates to Foreigners, i.e. persons belonging to none of the U.S. 2d " to those who belong to some of the neighbouring state & 3d " to those who are inhabitants of this State but have removed from one town to another.

1st Under this our Const. no person not an inhabitant of this or any of the U.S. can gain a settlement here, unless by a vote of the town, or by purchase of the civil rights & settlement, or by holding & executing some Judicial office Sh Com 2 91. & 22. Ja. 109.

2d - No inhabitant of any of our sister states can gain a settlement here, unless he has one of the above

above qualifications, or is possessed in his own right in fee of a real estate, within & during his continuance, within the town where he resides, of the value of £34. & shall have owned the estate & resided in the town at least one year. — Do they have the advantage over foreigners, by this qualification? It.

So a stranger

inhabitant of this state can gain a settlt in the town by not removing, unless he have one of these above qualificat^ns, or is possessed in his own right in fee of a real estate of the value of $100. or has rented in that town, himself & family, for six years. — But he cant be removed until he becomes chargeable to the town, this those of other states may be. it. It.

There are several

Modes of acquiring settlt^s by the Ct.

1st. by birth

— If there were a child is first known in fama to be the place of his settlt. 1 Bl 362. Burn 433. Doug 364. Sal 465. 12 Ray 567.

And therefore the place of birth, is generally speaking the settlt of a bastard, and in all cases where neither father nor mother has a settlt thence holds good. for it is impossible to exhibit this presumption otherwise than by shewing a derivative, or an original settlt in the child & extends until there. 1 Bl 362-3. 469. Burn 433. Sal 427.

But in the case of legit^t children & common

Settlement) over Laws of illegit[y] also the presumpt[n] arising from the Law of birth may be rebutted, & in certain cases it is so as to illegit[e] child[n] in Eng. as in the case of Pauper Irish by Y of a pauper of one parish, to settle & Pauper in another, it was,

2 Ld Raym.

may be acquired by Parentage. The right of the Father or maintaining parent is the settlt of the child, — this species of settlt a called derivative — not acquired originally by the child, but attained by inheritance — it is so for in the nature of an inheritance that is derived from the father

10 Bl 363. 3 Bac Ab 114. 116. Burr. Sett. Ca. 341-2. Salk 426 Lord Ray 14 73.

In Eng this species of settlt (derivative) holds only as to legitimate children. But in Con of mulatto with a Negro to C. of Pauper follows Condition of their Mother as to settlt. The Pauper mulatto established, — this has been several decided 1 Root 154. 1 Swift 169.

The settlt of legit[e] child[n] not emancipated regularly follows that of the parent so that an infant child not only acquires the settlt of the father by birth, but also, while not emancipated acquires the settlt of any other his father may afterwards acquire, as is case of Natives, removing from Ct to N.Y. 3 Bac Ab 114. 116. Ld Raym 118. 3 Salk 479. Str 438. 831. Burr. Sett Ca 49. 64. 240. 626.

And on death of the father the settlt of child not emancipated regularly follows that of

that of the mother Bac. Ab. 49. 64. 372. 2 Ray 1473. Stra 746. & this is on the same principle of the settlt following the person, the mother & the maintaining parent of the child is under the domestic government & controul —

Female however is not principal for you will recollect that if a Widow marries a 2d Husd she is not bound to support the child[ren] by the former Husd — tho if under the age of 7 they go with the mother per nurture, but in case the Husd refused to support them as he may & the wife is deprived of the power to do it by the covenant the parish to which they belong will be obliged to do it — & this even tho they continue with the Mother — this Eng. Law. Lal 470. 528. 3 Lal 259. 2 Ray 895. Doug 9n.

By the Laws of Con. a Woman never gains a settlt by living with a Husd[n] appointed by Act of Prov. tho he may have a right to live with him, & cant be removed if they chose to live together. But if she or that of he leaves the Province she may be removed through as before.

Indeed a minor by our Law cannot gain a settlt by our Law, unless he is emancipated. 1 Root 131-2.

By the registration of a minor. Hence the right of woman one is lost. Law-son can be lost and other way, a man cannot have two settlts at y same time, tho' he may have

Settlement? Have the qualifications to entitle him to vote or none, as a this state owning land in Ds[illegible] town of the amount of $100 value in each. Can none be has a settlt in the town in wh he resides 1 Bl 363. Lal 528-9 Burr. Ld. Ca 376.

An Infant may under some circumstances acquire a settlt by his own commencement, & then his original derivative settlt is lost. thus under a St of Eng. an infant Apprentice may acquire a settlt by living with his Master 1 Bl 364 2 Ray 567. 3 Salk 66. 356.

And an infant by acquiring a settlt for himself becomes ipso facto emancipated from parental controul, or in other words he is no longer consid? as Left to his father Dr Jun. upon wh. the emancipation in England is that of acquisition of a settlement distinct from his fathers family, for it wd be absurd to say that the state of a settlt of his father, when he is dead & removed from his controul is 1 Salk 356.

But in Con no person acquires a settlt by residence if he is not emancipated either by living with a Master, or in any other way - for if not emancipated the father may command his time his labour & his services, & so give him a settlt and by such use this connexion between them when then a child is emancipated ie. ceases to be considered in Law as subject to the father in

in the character of Serv.t A under this can Govern-
ment, he cannot take benefit of any mar-
riage entered by his father, but he may acquire
acquire one for himself 3 BR 116. 355. 8 id 479
Stra 938. 931. Bur. Let. ca 270. 638. 805. 1 Wils 163.

And the rule holds even tho he lives
with his father after emancipation i.e. when he
lives with his father not under his command, for
then he is but a boarder, or as a stranger labours
for hire — he gains not settl.t 5 BR 588. 1 East 526.

The Emancipation of a child may
be effected in either of four ways.

1st By attaining full age. I do not
mean that this of course & necessarily is an
emancipation — see y.r meaning of it infra Bur
Let. Ca 270. 1 Wils 163. 2 BR 956.

2d By Marriage. Or Prof.n by Mar.e
emancip.n i.e. is no longer subject to parental
controul, is no longer a Serv.t because he enters
a relation with wife, a state of servitude is
inconsistent Stra 938. 931. 5 BR 603. 8 id 115. 1 East 526.

3d By gaining a Settl.t of his own
as an Apprentice acquiring a settl.t by living with
a Master — he is emancip.d by it 2 BR 966.

4th By contracting a relation incon-
sistent with servitude to his father, or his remaining
subordinate to & under his care & govern.t as
of a Minor of 16. enlists as a Soldier, here another
acc.e authorises that of the father. Bur Let Ca

Emancipation Acts 16; 8a 633. 3 ER 114. 116. 356. 5 it 444. 8 it 479.

Attaining full age does not of course occasion an emancipation, for if a child after that age continues a member of his father's family in the character of a son as before, and just as parental control, he is not actually emancipated, but only has the power to claim & to it if he will; & if he did claim & take his freedom & would not with his father to labour for him, he then was as a stranger 3 ER 2 Str. 1 Bro Ch. 2 it 276.

It follows from that if a child after full age, who is not emancipated & duly, continues with his father as before, he acquires the rights of his father, & is emancipated. it & acc.

3d. Settlements may be acquired by Marriage. By mar.e a wife does not acquire the settlt in her own right, & not even as a derivative settlt, for on the mar.e the husd's settlt if he has any is communicated 2 Ves 1146 1 BC 363. Abr 544. Sal 526. Bur. Set. 62. 34. & often a woman settled in the town of O. marries a man settled in town of B. she has not by the mar.e acquired a settlt in B. & cannot settle in O. for upon her husb coming to O. no person can have a settlt it & acc. & Bur. Set. 82, 122.

And it has been decided, that if the husd &

[illegible] [illegible] [illegible] has not [illegible] — [illegible] case he was a foreigner, this is [illegible] [illegible] the [illegible] survives ag^t on this death. — This so decided both in Eng & Conn. — [illegible] not [illegible] now, tho the rule once bid fair for as any for immortality — & was [illegible] [illegible] [illegible] stranger of [illegible].

"A woman having a settl^t married a man with one [illegible] was [illegible] being dead [illegible] yt [illegible] was gone, [illegible] Sir [illegible] Bart. [illegible] settl^t suspended [illegible] remain living & [illegible] but him dead at both [illegible] ag^t"

"Chances of Puisne Judges

Living the husband [illegible] him dead at both [illegible] ag^t"

Peer. Set. Ca 122. [illegible] 544. & 82. [illegible] 232.

But notwithstanding [illegible] [illegible] Sir John [illegible] & [illegible], the law [illegible] established that if a man having [illegible] [illegible] does not [illegible] with the realm, or [illegible] within the realm does not remain with [illegible] his wife, her settl^t is good for herself & her children by the marriage

Peer. Set. Ca 367. 376-1-3. 122. — *Finis.* —

Decision of Judge Gould, On the case of a Penal Bond given by an Sheff for [illegible] — [illegible].

This is an act. of debt [illegible] brot on the simple contr. [illegible] a penal bond. The quest is — will the [illegible] lie on that penal contr. [illegible] to be much

Penal Bond of Defendt & much the same as it would have been had he made a Prom.t to pay, after he was of full age & the quest depend upon the Point whether this bond is void or voidable. It is a clear case of where a man has two remedies, he must resort to the highest, thus in the case of a Bond being given he cannot resort to the rem.l contr.t for that is merged in the bond, & does not remain a consid.n for a subs.t quent Prom.t This quest. then depends upon the further quest whether the rem.l contr.t is here merged in the bond & that depends upon whether the bond is void, or voidable, if void, the rem.l contr.t is not affected, if voidable it is merged, for the bond is good until avoided. so that the quest is to be determined upon the simple Point whether a Penal bond of an Infant is void or voidable. Dr Swift & I have no decided opinion on the subject; if it were to be considered as a res integra I should think it voidable, for then the privilege of the Infant is preserved, & advantage cannot be taken by thus construing it, for then he can either depend or affirm it, & surprise a consideration on the other party — disadvantage not depend by the other party — Upon the whole, this is said. — I upon Point, I should decide that the bond was voidable. This is the construction given it by Chancery, as in case of a bequest to pay his bond debt & the executor dies — Qu.re if an argument that is not a consideration on the part of the testator to this bond but a moral quest. at any day this be what is the law, & therefore merger of one obligation to the other above. I decide it to be void etc. — Dept must pronounce the bond to be void —

Sheriffs

Their under Officers.

I shall under this head introduce several other subjects, which it is difficult to class under any other.

The word "Sheriff" is found in its true etymology, to possess a shire or county, it being the first municipal & ministerial office of the county. It is derived from "shire" & "reve" 1 Bl. 339. 343.

The mode of appointment in Ga. is by the Governor & senate, called here the Council, & has as I suppose it in Georgia and the county one is appointed for each county by the holds the office at pleasure of the Governor & Council. 1 Bl. Com. 343. as to mode in Ga. see Dig. 429. 430. 431-2. 434-5. -

Ever Sheriff must reside in the county for which he is appointed, for he is a county officer, & has no jurisdiction out of it, i.e. for tho it is not necessary that he shall live in any part of his county & execute an office and commence suit in his own, as if he attach the goods of a man in A. and reside in the county of B. he may in the latter case & copy of the attachment as the process of the Superior Court, & bring the defendant out of the one county into another, he can not do this at the limits

county of his county, but he will carry the prisoner to the Circuit Court in the other county 4 Ba 435.

The prisoner

escapes, the Sheriff of the county in which he escapes may pursue him into another & retake him for that purpose in pursuance of the original arrest & continuance & furtherance of his legal duty. Wms 1 4 Ba 435.

And on an attachment for a Contempt committed in office and after the termination of his office, before the hearing & upon motion by serving the party, he is removed before the rule is made absolute & complied with & he is removed. Upon an Ex parte & an entire proceeding act in Law, & cannot be complied with or commenced, Val 918. Cox 393. 534 Wms 893 – 894. Y Or do any official act pursuant to previous existing office

He cannot make recognizance for legal duty & the compliance of the parties to it. B Constable in the discharge of their duties.

Sheriff & L. a Sheriff

Deputies may appoint Deputies & under Sheriffs & are as his representatives & Exrs. Published. and they may execute all the ordinary ministerial duties of his office. Every ministerial Officer is liable for positive neglect and misfeasance, & cannot be excused by other than Principal Wms 12. 4 Ba 434.

Sheriff, a Coroner by Law, & Constable may appoint a general Deputy without the appointment of the

Sheriffs Deputies } The County Ct. Over the Sheriffs & the Deputies counties may depute each other, & attend to duties without such a Deputation. Ls Con. 501.

Every Deputy Sheriff is removable by the Sheriff at pleasure, for he acts only under the power or authority derived from the Sheriff & as his agent or servant and may be withdrawn by the latter at pleasure. But while the Deputy actually remains in office, his functions as such cannot be abridged by any act of the Sheriff. Lal 95: Wood 13. 4 Ba 137. 418. This latter rule is founded on the principle that the Deputy must have all the rights & incidents of his office, so it is not for the Sheriff to say he shall not have the powers of his office.

In Con. in certain cases, the Court may on application by virtue of a St. remove Sheriffs, or forever disqualify a delinquent Sheriff as C & L. Ls Con. 501.

In Eng. the Deputy acts officially only in the name of the Sheriff, for he is not himself regarded as a known party, but as an Ser. or offi. agent of the Sheriff. Hence therefore by the C. L. are no actions for torts of Sheriff Answer to the Deputy — & for the same reason. Cow 65

And tho, the Deputy may execute a writ, he cant return it in his own name, this does not mean that he cant do physical act, but the endorsement of service must be in the name of

of the Sher. to whom it is made directed. it satis Dal 95. Com 65. 4 Ba 497.

In Com. on the contra a Dep. may act in his own name being for considered as the act of his. A writ may be so drawn as to direct it to the Deputy as well as the Sher. "to the Sher. of the County of B. or his Dep." Sho Com. 21. 212.

This however is only by virtue of the St. and not at Com Law it has also been determined, that a writ directed to the Sher. alone may be executed by the Deputy in the name of the Deputy. & this too whether he be a Sheriff or gent Dep. Bac. 237.

Also it is said that when a Deputy is appointed, the Sher. cannot abridge his Power &c. & hence a covenant by the Dep. not to execute process of a certain description is void as against Law — for it is his duty to execute every process against him; & therefore shall not abridge the acts of the Deputies, as in the case of Powers, has been made void in Eng & Com. but they have all failed Abbott 14. 4 Ba 496 n.

A Dep. Sher. cannot delegate his authority for all the Law is itself delegated. And it is a kind of elementary principle of jurisprudence & prohibits that a ministerial act. such be delegated. Thus a Dep. cannot act by proxy, or an attorney authorized as attorney unless he is permitted so to do by a statute which superseded to the Power of attorney as commonly the case. But when one acts in his -

Dep. Sher. } his own neglect as an Ing. Pers. he
may act by proxy. for he is not a Debtor.

But a Dep. Sher. may order other Dep.
to take in any parti. act, as to arrest. but
the. is not acting by representative, but commanding assistance, for the himself must be present
in order to make the Bail. Salk 96.

And on paper there is a rule laid down in Ho
but he sets negative qualifications, viz., that an
arrest by an assistant of a Dep. Sher. is not
good. the rule holds only when the Deputy is
not present, or not [when present &c.] acting with the same
object. for otherw. it does not amt. to a Delegated
auc. 6 Mod 211.

If a Sher. directs a warrant to
two persons, either of them may execute
it. In action an auc of a Sub. nat. is given
to two or more persons, it is several as well
as joint, but of the auc is of a pur. nat. it
is joint & not several. — This auc is of a Sub.
nat. 1 Inst 181. Dra 117. 4 Ba 403. 442.

If a Sheriff
Sheriff is guilty of any neglect of duty — as by
negligently suffering an escape, the Sheriff
may have an action on the case ag. him, for
the Sher. is immediately liable over to the
party injured. — And besides such a neglect
is a violation of his implied engagement to
do his duty faithfully with regard to the
due discharge of the office. & the assistance of an

* Also if one appointed by B. his attorney. they can only act jointly

Sheriffs

of an office always raises the implied engagt.
Law they are gen.ly the publick — but Law &c.
is liable to the Sheriff. because it is no fair rule
as that the Sheriff is liable for the neglect. 1 Bol
Ab. 4 Ba 442.

The Jailors of the respective counties
are Ministers of the Sheriff & are removable & appoint-
able by them. and the Sheriff is in effect keeper
of the goal or com.n Prison of his county. 4 Co
24. 4 Co 119. Lit Com 222.

The Sheriff as jailor has regularly no right to confine his prisoners in any
other place than the com.n Prison it being the
place appointed by Law for their confinement
& if he does confine them elsewhere he is guilty
of false imprisonment, that is generally he
may by 32 H. 8 allowed to confine them in other
place as in a Lunatick-ty or Bridewell. But
the K. Bench is universal, if not thus said
Mod 282. Latch 10. 1 Sid 318. Sac 466. 5 Ba 171.

The Sheriff
being in effect keeper of the goal it follows of
course that he can't be confined in his own
county. for he then would be his own keeper.
& of course can't be arrested in civil cases.
for the arrest is subservatory to the imprison-
ment. Lord Ch. Com. it has been determ.d
that if a Sheriff is arrested on a civil suit the
action will abate. Finch 345. 2 Ba 479. Styles
405.

* He may be arrested in Eng and held to nominal bail = the par law knows not of nominal bail get here he may be arrested and held to trial.
6 Johns 24

Deputies } If indeed there is a special prison and
for com.n purpose in the same county, of which
the Sher.t is not keeper. Sup.pose he may be
used to put the imprisoned, for the above reason
does not hold in this case. In Eng. there are
many such special prisons but then a comm.
must there. And I take it there are such cases in
wh. the Sher.t may be amerced.

As to crim.l cases agt. the Sher.t our law does not provide, but I think
that here from the necessity of the case, he'd
be imprisond in the next county. The case was
once moved in this state, but not decided
but the Judges seemed to think this would be
the case. 3 Leon. 199. Latch 16 1 Mod 198 6 John 22

But the Marshall of the district is not
the keeper of the prison, a case arose in the county
of Middlesex - the Marshall was imprisond. - there
for the Sher.t & demanded the keys. - they were given
him by the Sher.ff & the Marsh.l tendered self act. -
& heavy damages were recovered agt. the Sher.ff for
the escape - the prisons of the several states
are but lent to the U. S.

As the Def.ts are but
Sher.ts or Dep.ts of the Sher.t - it follows that the
Sher.t is liable civiliter for the offs. and
defaults of the Def.ts tho' upon the maxim
qui facit per alium facit per se.
the word "civiliter" is here emphatical, for
he is not criminally answ.le for the acts of Def.ts.

Ld. Raym. 584 = 4. Salk. 98. 1 Salk 44. 2 Lev 15 S. 1 Vent 314.

You doubtless perceive that the liability of the Sher.ff. is analogous to that of the master for the acts of his Servt.. In consequence of the liability the Sher.ff is allowed to take security from his deputy for the faithful discharge of his duty. Stg 15. 4 Bac Ab 441.

Any subject of liability the sentence is, Either the official acts of the deputy are to be civil & suppose the acts of the Sher.ff & he is liable civilliter for them tho not criminaliter — for a man is liable for no offence except such as he was personally guilty of. 2 L Ray 1374. Doug 4.th. 2 Wm 154. Latch 167. 6 Mo 3. 336. 1 Wms 296.

But this liability of the Sher.ff is limited to the official acts & neglects of his Deps.. — he is not liable for the torts committed by Deps. in his individual capacity, for with them the Sher. his off.r acts. The Sher.ff has no remedy case of a fraud committed by Dep.ty Sher.ff. 1 Ro Ab 94. Cro E 174. 1 Lev 116.

It has therefore been doubted whether, if a deputy under a warrant to take the goods of A. take the goods of B. the Sher.ff. shall be liable. It is objected on the one hand that he shall not, for the act is not in pursuance of the authority derived from the Sher.ff. But rather the action is to be maintained contra for the Dep.ty acts officially tho tortiously, & if the Sher.ff. not liable in case he shall be in none, for it is not the case that he ever orders his Deputy to neglect his duty &c.

* 4 Bac 441

Deft's Sheff & indeed it must be allowed in every case where the Sheff acts by his deputy to be an act he ought to answer for himself. 4 Ba 442. 2 Bl R 892. Doug 423. Mills 89.

When the affr is committed by the deputy is done with force the Sheff is liable in trespass. — so that the form of the action is how Deft. How that act of Mast. for the act of his Serv't — who is liable only in case. The reason assigned for the diffr is that the Sheff & all his substitutes are considered as but one person — but this principle is not satisfactory (the reason is technical) 5 mo 2 Bl R 892. 894. 2 Keb 352. Hoy 24. Doug 42.

For a mere omission of duty by the Deft the Sheff alone is liable to the party injured — & he has his remedy over agt his Deft — as in case of a negligent escape, or negligent execution of process — this is at Com. L. because the Deft is not a known Publ. Offr nor acts in his own name, & gives such an authority to the Deft for which the Sheff is responsible. The process must be produced in evidence & being directed to the Sheff it will not support the action. Cow 403-6. Salk 95 & Co 89. 1 Rol 94. 2 Ba 243.

But for a positive tort or misfeasance committed by the Deft in discharge of his office both Sheff & Deft are liable. The Sheff. for the act of his Deft was officio. The Deft. because the party injured may consider him as a tort feasor & is not bound to ask under what authority he acts — whether process be in his hands, & this case is no justification of Deft, as in the case of an

* This is an deviation from the analogy of Master & Servt in a similar

an Exr" sued out agt A. & Def[t] [illegible] B. — this a a tort. & the acc[t] & Def[t]'s Deputy inefficient & nugatory as to the claim. for wt he acts.

But in case of an omission of duty, the remedy must be sought thro' the same, therefore the Def[t]'s is not liable for the reason above Lac 18. Eng C. 175. 1 East 106. 3 Lev 258.

For a voluntary escape the Def[t]'s is liable, for this is a positive tort & he may be consider'd as a rescuer & indeed he is positively in that situation;

For the default of a special Deputy appointed at the request of the Pl[ff] in No Bro. esp & upon his nomination, the Sh[ff] is not liable so far, as injury may arise to the P[ltf]. for the risk is all to gain this, but if the Def[t]'s Gaoler by any wantonness conduct towards the Def[t] in the process, Sh[ff] is liable for it— [illegible] which does not extend so far. 4 Mod R 126. Cro J. 607.

Under our Law, we treat the Def[t]. as a known Ind. off[r], he is liable as well for his defaults as for his positive torts. or for non-feasance, as mis-feasance nothing at Com. Law. Sh[ff] alone is liable for the former but then, the process is directed to a Deputy, he acts in his own name, & the endors[t]. of service is in his name, & so his liability here is as extensive as Sh[ff] at Com. Law.

The rule thus [illegible] laid down as to entering the acts & defaults of the

Deputy Sheriffs } Deputy Sheriffs extend to the acts & defaults of Jailers. for there are this distinctions as to keeping the prisoners that for no other purposes

after the death

of the Sheriff & before another is appointed if the prisoners escape there are not liable at C.L., for the death of the Sheriff dispenses with execution of the office of Jailer. & as by the Gen. nature & execution of the office of Jurisdiction, revokes the office of Deputies In Points of Law & Policies no inconvenience has arisen from sole, that it would seem to be prudential of very great. And by the Stat of 21 Ed. this must now be the case, for the Sheriff is not liable after his death & Deputies are not Rep. of the Sheriff. 4 Ba 445. 3 Co 72. Bro Ab 366.

That is true in such case no remedy in theory of law & what by retaking the prisoners after a successor is appointed. But this difficulty will never arise, for it is to be supposed the Jailer will continue in office & depend upon the justice of the Legislature for his indemnity 1 Mod 14. 4 Ba 445.

Office & duty of Sheriff & his deputy inseparable Office

By the C.L.

The Sheriff is a judicial as well as an executive & ministerial officer. In this State he has no judicial power whatever, tho we have the same in Eng. by Com. Ab. Sheriff. or he has any power, or not in the other U.S. I dont am not informed 1 Bl C 343. Inhabit therefore

thus for that time merely as a ministerial
officer? As a conservator of the peace, in which
latter character he is chiefly an executive officer

There is a case, that a "ministerial
officer" is as State v. one who executes the law
in pursuance of the command of a superior
thus a sheriff acts ministerially in executing a warrant
directed to him by the Ct or a Magistrate.

An Executive officer on the contrary, is one who
executes the law without much command, or, I suppose
the law only, such under Govt are the heads
of the Departments, executive so far as they occasionally
act in obedience to the President. on both Ex A
There are the two great distinctions of the sheriff's powers
as understood by our law.

As an Executive officer, the
sheriff is the conservator of the peace of his county. He
is said to be the highest executive officer in the
county, it would be more correct to say he is the
highest executive county officer, for the Govern. of the
State may reside in the same county, who is an
higher exec. officer but not a county off. 1 Bl 343. 1 Hale
93. Sk Con 384.

As conservator of the peace the sheriff may
At Com. Law at Com. Law and indeed must apprehend & commit to
prison all who break or attempt to break the peace
& he may bind them to their peace, but this is
a judicial act, which by our law he cannot do, but
this must be done by a justice. And he may & offi-
cio apprehend & imprison all offenders against the laws

Sheriff. by Off. 1 Ld Raym. 1 Salk. 5 Mod. Term. or Stores, Nation Manwaring &c. and by it is one of his Ld. duties to defend the county agt all enemies both foreign & domestic & for that purpose to array com. & the posse comitatus, or power of the county, which by the C.L. consists of all male persons above 15 yrs of 15. except Peers. 1 Burr 16 S. 4 Ba 430. 453. 1 Bl 343.

By Con. the Ld Lieuts the sheriff with similar powers, except the judicial, may be authorized & commanded to do all acts belonging to their respective offices & including all persons of age & ability, not excluding females. Ld Con 384.

And by our Ld the same power is given & constable within their respective precincts & towns. & Ld.

As a Ministerial Officer, the sheriff is bound to execute every legal precept regularly directed to him, & upon refusal or neglect he is subject to fine & imprisonment & to a civil suit, in an action on the case by the party injured by his neglect. &c. Dlow 74. Cy 60. 1 Bl 344. Ld Con 385.

And by our Ld a sheriff is liable to a civil suit for neglect of duty in one instance, in not levying money that is levied at C.L. it is, for neglecting to return the writ as the Law requires. At C.L. the if he neglects to return the writ, the Court will make an order for him to return it in a given time usually four days. - & if he does not obey the order he is liable to an attach. for contempt of Ct. & to a

as a fine, to remunerate the [illegible] 291
4 H.6. 2 R.P.C. 233. 1 Ba 56. 206. 3 Dr 467-2. Cro D 616. Sh Lon
71. X

Every [illegible] every officer or minister of the peace
also his deputy may of right command the posse
com.s for the purpose of executing process & every
person is legally bound by the command under a
certain penalty 2 Hawk 193. 433. 4 Ba 453.

And on suggestion that a further provision in Com. Dig is not known to the Col. It is that in case of great resistance
either actually made, or apprehended, the sheriff may
with the advice of an Assistant, or Justice, raise
the whole or a part of the Militia of the county
as an organized body, i.e. commanded by their officers &c. & constitute himself general pro tem, &
tho it adds that he should not return "unless
to execute the process" Dig Lon 3 94.

As to the rules respecting the Right of Entry
or it is called, see the "[illegible] title treat. upon
things, & the leading case 5 Co 91. Cow 1. Cro E.
909. Hob 52. 2 Ba 367.

And however observe upon suggestion that
that if a person while under an arrest illegally
made by breaking the outer door or window of
the house, or close, while under this arrest
with another process of suing made it is good
provided there was no collusion between the
bailiff or officer of the two cases 2 Bl R 823. Cas H 605.

* I do not find this person given time by any rule of law. It seems
that he may command [illegible]

What will amt to a Presenting? I suppose that nothing but a removal of some fastening will not amt

Sunday.

By statute a Person may be arrested on Sunday for treason felony or breach of the peace, and civil process can be served on Sunday. A writ on an arrest and bind: of course if a sheriff or other officer executes a civil process on that day he will be guilty of false imprisonment 4 Ba 656. Lee 78. 2 Ld Raym 874.

The statute however only applies to original arrests. — for if a person already in lawful custody escapes on a sunday or on any other day he may be pursued & taken on sunday by the C. L.: for the retaking is no more than the means of continuing the sheriff's lawful original custody, & is the same pursuit that he can guard a door of the prison on y^e day, & stop the prisoner from escaping if the door becomes open by accident or otherwise 4 Ba 295. 2 Ray 1026. Lee 622. 3 PR 25. 6 Mod 95.

In case of an illegal arrest on sunday the Ct will doubtless discharge the prisoner on motion, & possibly he may be relieved by an habeas corpus

The Law of Escapes.

This subject has already been treated of under the title of Arrest in y^e case; but I shall here, treating of it more because that title has already become too unwieldy from the quantity of matter, & more attached to it.

When a person lies under a lawful

[illegible] criminal process this privilege does not hold — but he cannot break except Sundays — 1 Ld Ray 318 4 Bo 403 [illegible] N.C. 78 4 Bo 447

lawful arrest & is restrained of his liberty, either violently or privately evades that restraint or is suffered to go at large, before he is discharged by due course of Law, he is said, to escape or to have committed an escape 2 Ba 233.

It is true at Law even that to an escape, that there has been a previous legal arrest, for the evasion of an illegal arrest is no escape according to the definition Exh. D 5 & 9. Cow 56.

An arrest to be legal must be made in pursuance of a lawful writ. If an arrest not in pursuance of a lawful writ is itself unlawful it is no offence, but when I say an arrest must be under a lawful writ, I do not mean that it must in all cases be made under a lawful writ or warrant, for a lawful arrest may be made in some cases without any writ or warrant, as in the case of arrest in which it is the duty of a sheriff thus to arrest. 4 Ba 456.

1st When the arrest is made by virtue of a writ or warrant, the general rule to determine whether it is lawful or not is; If the Ct from whose office the writ issues, has jurisdiction over the subject matter, the arrest is lawful. i.e. the writ will warrant the arrest. of course suppose a person thus arrested is dead at large, and he escapes. This will however presuppose the mode of making the arrest to have been regular & lawful; for irregularity in the mode will void the arrest. —

Escapes

And the circumstance of the process being erroneous is no objection to the arrest for the process is good & effectual to every purpose until it is set aside by due course of Law. 2 Ba 234. 236. 3 Wils 384. 5 Co 64. 8 Co 141 b. Stra 599

2d On the other hand if it be by virtue of a writ, the writ appears on its face to be void for want of jurisdiction of the subj. mat. the writ is void. & the arrest under it of course unlawful, & in such case there can be no escape. but it is the duty of the officer to let the prisoner go as soon as he pleases 2 Ba 234. Cas B 333. 391. 608-9. 669. 2 Wils 384.

To illustrate these rules. 1st By the 1st genl rule if that of J P from whom the writ issues has not juris. of the subj mat & arrest is illegal. then an arrest for a debt out of the C. B. Eng is good. But if the arrest was for a criml act. it wd be void. for the C. B. has no juris. over crimi. matters.

Or in Con. A single magistrate here has cognizance of debts not exceeding $15.- an arrest then from his auth. for sum wd be good. but if it was for $50. or 100. it wd be void, as said.

The first branch of this genl rule is not universal, but the 2d is i.e. when the writ issues from a Ct whose juris. does not extend to the subj mat. the arrest is void. but process issued from a Ct having complete juris. of subj mat may be void as from irregularity in the execution, there as where the writ is made returnable at any term of the Ct subsequent to the sitg. it wd be absolutely void for

Escapes 3 for if the prisoner was but rioting, it is known only by pleading, no that the party might be imprisoned or held to bail for any number of years & fined — and the plea for justification — Bac Abr Escape (B) 3 Wils 341. Esp. D 328. 9. 605—9. Dal 233. Bro C 145. Carth 148. 1 Rod 13 15. —

In all cases

This rule does not always run as any where from the time applied to for rioters the same time does it is therefore apparent that the first branch of the genl rule above is not sufficiently broad & covers all the occasions occurring in our practice, here the majority being the writ is not always the test to which it is returned, nor must there be had another writ as to those cases, not covered by the 2d. & not issued by the Ct. to which it is returnable. The rule is, if the process is issued by a Ct having competent auth. & returnable to a Ct having jurisdn of the subj. matter the arrest under it will be lawful, provided the proceedings be regular; then deft. who evades the restraint unlawfully is guilty of an escape — thus deft from the Ct.

On the other hand if the writ is issued by one not having competent auth. or returnable to a Ct not having jurisdn of the subj. matter the arrest under it will be unlawful, — & then no escape thus if the writ was issued by a private individual & returnable to a Ct having jurisdn, or a Ct having jurisdn of the subj. returnable before a single justice, in either case it will be void. It is necessary to recur to the rule

Escapes 2 mile in Com. in all cases not covered by the
B.L. but the B.L. is good as to those cases within
it.

At C.L. an off.r who had made an arrest upon a fin-
al process cannot appoint a stranger to keep the
prisoner even for an hour or a day during his
(off.rs) absence — for if stranger ab kept him for an
hour he might as well for a Month or a
year for the law does not distinguish between
off.l periods of time 1 Hal P.C. 596.
Time Relative, however is constantly introduced from
in Com. Law — for the case may be considered as
exempted from usage & do not pretend to
say.

2d It is essential to an escape that the arrest
has been actually made. — Low words will not
constitute an arrest at Law, but there must have
been an actual touching of the prisoner, or else
a submission to it, a power to take immed-
iate possn & a submission to it by pris.r, so if
off.r say "I arrest you" & the deft runs away it
is no escape, but if the off.r had touched him with
the wand or similar words it would have been good.
& under the circumstance also he submitted & if he
obeyed him as if the arrest had been complete
Cro E D 604. Lal 79.586. B.N.P 62. 2 Bac 36.

3d is a case of the
2d that if one is arrested at the suit of A. & while
in custody of the officer a writ at the suit of B is
delivered to the off.r who has charge of him, deft is

considered in custody at the suit of Baker, if
the person he had made his captive & guilty
of an escape on Cotton's 5 Co. 89. Sal 207.

I dont precisely know what word the case
can apply in our prac. but in Eng the Bench
is reasonable for when the process of arrest, is a
process of arrestment, but in Com. the attach-
ment is agt the prop. & the person of Deft to
compel him agt the person in default of prop. the
rule I think shd be thus qualified, That Deft. will
be considered as in custody upon the sec. com't. pro-
vided he has not Com. prop. & Plff had ord. and Deft to
take his body. — The command of Plff & not the
body, is not to be obeyed by the Off. if Deft has Com.
property.

The arrest must also have been legally made
& notice, gen. speaking there can be no escape
thus, in all civil cases the arrest must have
been made in pursuance of a writ or warrant
4 Bac Ab 442. & by the Off. to whom it was directed, i.e. it must
have been made by the Off. in person, or by his As-
sistant, when in company with him, — it may be
made by the hands of his Assistant when in the
company or presence of the Principal. Esp D 604
6 Mod 211. The latter rule however does not
require the Off. shd be in the immediate presence
or actually in sight of the Assist. at the time of
the arrest, it is sufficient if he & the are engaged in the
same object, thus if the Off. is round one door of
a house & Assistant another, & Assist. makes the arrest

escape } amount to a good ~~ar~~ arrest.

By the Ct.

Cur 2d. If a similar one of our own, an arrest on Sunday in a civil cause is void, here there can be no escape, for the arrest being merely void, he cannot be detained 1 Mod 95. Salk 76. Esp. D. 605.

So also if an arrest is made in civil case, by breaking an outer door or window of the dwelling house, there can regularly be no escape — In crimi. cases the house may be broken. Esp. D 604. 5. Com. Dig.

If an offr having an opportunity to take a man ag. whom he has a precept of arrest, refuses, or neglects to do it, & the man afterwards evades an arrest the offr is liable, — not for an escape for the arrest was never made, — but for a contempt or for a neglect of duty 2 Bac 331. 2 Mod 93. 24. 10 ib 251. 255.

An offr exercising a gen. auth. as a sheff. peace Offr or a constable is not obliged to shew his writ or warrant till after he has made the arrest of the person, or unless he on demands it. but after the arrest made he is obliged to make known the cause under the act & also the contents of the writ. 9 Co 69. Cro. J 485. 8 ER 187. Esp. D. 604. The reason of the rule is that every individual is supposed to know the official character of every offr who acts under a gen. auth.

But a Sheriff or Bailiff, must if required shew his authority before making the arrest. If he proceeds to make the arrest before producing his authority, if demanded, the party is justifiable in using any violence to prevent the execution, for otherwise a party would be liable to have his person taken from him by any ruffian who had chose to assume the character of an officer. 9 Co 69. 4 Ba 452

Escapes are of two kinds, voluntary & negligent. The latter is sometimes called Remissive.

A Vol. escape is one which takes place with the consent of the officer who holds the party in custody. A Neg. escape is one which takes place without such consent. 3 Bl 415. 3 Co 52. 1 Hid 330. 2 Ba 239.

And the principle that any person committed to prison, is to be kept in safe & close custody — salva et arcta custodia

If either a Sheriff or gaoler suffers his prisoner to have the liberty of the prison even per consent he is guilty of an escape, for the law will not distinguish nicely between a person all & unnecessarily time 2 Co 44. Plow 36. 1 Rol 806. 3 Bl 415.

Voluntary Escapes. If a Sheriff or Gaoler permits, or suffers a person who is not bailable, by

Vol. Escape } the escape is vol. And if the inmates
to prisoners going at large even for a moment &
mix with others, the consequence is the same
as escape

Such is the case when the person is arrested
on Ca. Sa. not actually committed for of law makes no
difference as to an escape after an arrest on final
process & after a commitment to prison 2 Str.
876. 1 B & P. 26.

And observe that persons arrested on
a crimt. process are regularly confined within
the walls of the prison, but if arrested on
a civil process, by obtaining security to save
the sheriff harmless they may be admitted to the
liberties of the prison yard. 4 Str 1141. 131.
These liberties of the prison yard are considered as a
part of the prison, so when a person is ordered
to be kept in close & safe custody it is not meant
that he is to be kept within the walls. — The pri-
son extends all over the liberties

Mansfield decided in
Eng that if a person committed on a ca. sa. is brot. up
on an habeas corp. ad testificandum from a cr
ct. and a right to command it, the sheriff is guilty
if he not escape, but this rule has since been virtually
overruled, & indeed it can't be law, for it is contrary
to every principle, that to subject the sheriff for obeying
the order of a Ct. wh. at the time was obligatory on
him on penalty of fine, imprisonment, loss of office &
also liable to an action by case. 1 Dall 13. 2 Ba 278-9. contra

contra B.R. D.g. Hir 127. Root 92

But however if an off.r in bringing up a person from prison on a writ of Hab. corp. grants him any unnecess.y or unreasonable priviledge he is guilty of a vol. escape. As in Eng. a Sheriff carried the Prisoner a circuit of about 60 miles to give him an airing (as he said), & he was held liable for an escape. — Tis now settled that a Sheriff may bring the Pris.r not in the most convenient Way — & at the most convenient time 2 Hale 305. 2 Ray 2 411. 3 99. 788. 6 Mod 78.

And after an answer on final Issue, deft must be committed in convenient time, otherwise it is a vol. escape for the arrest is merely introductory to a commitment. If therefore a Sheriff suffers deft to go about even for a moment & with whatever he is guilty of an escape 1 B & P 24. 2 Str 876.

If the Sheriff discharges a Person committed upon final Judgt. upon Supp.n of the contents of the Ca. Sa. himself, he is guilty of a vol. escape, for he is not entitled to the Writ. & the Supp.n to him is of no more avail than if the Prisoner had thrown his money out of the window — Sup.r Ct Law will not allow the Sheriff to interfere in matters of this kind Str 404. 1 Mod 174. 9 Co 225. 366. 2 Ba 248.

If a Sheriff marries a woman committed on exec.n he is ipso facto guilty of a vol escape, for no man can be judge in his own

Vol. Escapes Comm. 2 Hawk. Hist. P. C. Chap. 23 §7.

If the Sheriff appoints one of his prisoners a Turnkey, he is guilty of a vol. escape — for by that act he renounces the custody of the prisons Esp. D. 605. Hawk. P. C.

If a prisoner having the liberties of the prison good shews a disposition to escape by overleaping the limits, it is the gaolers duty upon notice of the transgression being given him, to recommit the prisoner to the walls of the prison. & if he neglects to recommit him upon such notice, & such prisoner escapes it is a vol. escape.

But if he escapes without a prior transgression or before gaoler has notice of it manifesting such disposition to escape, the escape is negligent. Or in other words if by the commission of such trespass & liberties of the gaol he escapes, it is not voluntary 2 Str. 831. 1 Root 106. 127-8.

A Sheriff is not obliged to grant the liberties of the gaol to any prisoner whatever even to bonds of indemnity be offered, it is an act of his altogether discretionary — It is lawful for him to commit a prisoner to any part of the prison — & it is also lawful for him to admit them to the limits or taking a bond of indemnity — & that bond is good at law.

And as he is not bound to grant the lib-

liberties of the gaol to any prisoner he is not obliged to continue the liberty any longer than he pleases. 2 SR 131. —

Negligent Escapes — all cases above are such as happen without the officers consent — thus if a person arrested flies from the off.r & escapes by violence the escape is negligent for the time voc. long, or applicable only to the off.r — If one committed or called by habeas to the prison or by rescue or in any other way without the consent of the off.r, the escape is neg.t — if rescued it is immaterial whether it took place before or after the commit.t Cro. J 419. 3 Bl 416.

But to off.s is to be observed in several respects between escape, or mesne proc.s & one on final proc.s, for what wd not be an escape on mesne proc.s may be one on final, thus if a person is arrested on final proc.s & allowed to go at large even for a moment whether before or after commitment, the off.r is liable for an escape — the rule is the same tho' security be given for the surrender of the prisoner &c." in to cus tody. — indeed such security is void as being agt law. & the es. is not. 2 SR 172. 3 Bl 415. Cro J 665-6.

In Con such a security has once been determined to be good — but it is clearly not law. — 2 Root 133.

But if a person arrested on mesne proc.s is suffered to go at large it is not an escape if he be forth-coming at the return of the writ. so acts declared any just ex

Excepting it may be rendered agt him. In this the rule is, that the offr is not liable if the party be forth-coming any time during the life of the exr: nor may he obtained agt him in the same- 2 Bl R 1049. 2 BR 192. 2 Bl 1115. 5 BR 3?. Dal 468 2 Wils 295 — Stra 99. 2 Swift 174. This 2093 82. 434.

The reason of the above diffr: arises from the object of the two arrests. — an arrest on final process is considered as the ordinary means of obtaining payment, & as a species of punishm:. it is to hold the deft until he does pay — as the law will not allow the offr to exercise any discretion, or relax the rule even for a moment, for if relaxed so as to dimi- nish the liberty of deft for a moment, it might as well be extended for ten, & thus the object of the rule defeated — . — But the object of an arrest on mesne process is not to compell deft to pay a debt, for there is no presumption agt him, or indeed for him, but it is to compell him to re- spond any judgt wh may be rendered agt him, so that if he is in custody in case for that the object of the law is answered — & so is any it is necessary he should be forth coming at the return of the writ for no judgt can be entered without his presence — & in case the judgt may be entered without his presence it is not necessary to be forth coming during the life of exr:. If deft is not forth coming the offr is liable for an escape — so you perceive the offr is rendered liable for an escape in 4 instances by reason of deft's not, or in other words, that wh

writ was not orig.l an escape is made so by subsequent circumstance — But yet is a neg. exc. & not wd. because the orig.l act of endorsement is not wrongful but accord.g to Law 2 Ba. & Ab. 46. 2 Rol. 99. 804. Cro. E. 622. 652. 964. 2 Wils. 294

If a person arrested on a mesne process is committed, the gaoler by a writ of Habeas Corpus to go at large even for a moment is subjected for an escape, for on commitment the defft is to be kept in safe & close custody, & tho' every person is allowed to be enlarged on furnishing sufficient bail, & tho' the writ to remain & is committed, the time for giving bail is past. This rule is founded, not on the object of the arrest, as shewn above, but on the rule of Law, that no person shall be suffered to be enlarged on bail, after commitment 1 Rol. 97. 2 Wils. 294. Lal. 271. Cro. E. 964.

By St. 23 Hen. 6. & by a similar one of our own however, a person committed on mesne process may be enlarged by sheff on a bail bond. 1 Ba. 275. 1 Bac. Ab. 474. & Com. thereon. bail. remb.

The only remedy agt. the sheff for the esc. of one taken on mes. proc. is an act.n of the case, — in such cases, the damages are presumptive, for the claim agt. the orig.l defft is not liquidated, & therefore act.n of debt cannot be supported But sheff can support no act.n agt. sheff without proof of a legal claim agt. the orig.l defft by process, for otherwise it wd. be injuria sine damno. It is ergo a safer way to proceed first to judgt. agt. the orig.l defft

Case 3 dft. for the purpose of obtaining that proof & then suing the act. agt y. dft. 2 Wils 295. 2 Str 1129. 4 it 611. Cas C 17. 2 Str 873.

And just above in evidence for it is anne of evidence — That in y. latter case an acknowledgmt. of indebtedness by the orig. dft. may be proved in favour of plff in an act. agt y. dft. It may often happen that the acknowledgmt. of dft. is the only proof of y. indebtedness. & as this proof is admitted in an act. agt the orig. dft. the execution is extended in favour of plff in y. case agt the dft. as he has y. same claim agt the dft. he had agt the orig. dft. Peak. Ca 63. 4 TR 131. 1 Esh. R 169.

But for a ext. on penal bond. plff in the exn. may at election have either an act. of debt. on y. case at C.L. or on act. of debt agt dft under the St Westr. 2. / Rich 2. The act. of debt may then be had because the debt of orig. dft is liquidated. You will observe an act. of debt can be supported only for a sum certain, what is the case here but was not the case, in the act. above for an escape on a mesne process. 2 Str 1129. 1132. Str 153. 2 Ba 245. Esp. D 203. 2 Wils 110. 113.

This rule extends as well to escapes on penal proc. before, as after commitmt, for the terms of the St make no diff. & the debt is liquidated in both cases.

There is an essential diff. as to y. application of an act. of debt on the case

Exception 3 Ans. Def. ans. of debt for an escape. Def. ans. &c. for an escape as well on final as mesne proc. The jury are not bound down to any specific rule of damages — for the act. is tort, for a tort — the misconduct of off. & of damage of plff. — & it is only for the consequential damages arising from the loss of the orig. act. 2 SR 129. Esp. D 609.

And hence the amount of damages agt. off. does not exonerate the orig. defts. for the loss of the orig. act. but the jury are not bound as a matter of course to give the whole amount of the claim of the orig. act. still they may & ought to do it is justice when the loss of the orig. act. was the cause of the loss of the whole claim agt. the orig. defts. Bak. R. 171-3. Bak Ca 124. 2 SR 129

And hence also arises a rule of evidence, that as the orig. defts. is not discharged by the act. agt. the off. he is a competent witness agt. the off. he not being interested. But this rule of thumb is too gen. for it seems to me, that if the off. should recover the whole amt. of the demand of the plff. the act. agt. the orig. defts. shd. be discharged. it ans. &c.

At any rate if specific damages only are given agt. the off. & plff. may state recovery the debt or claim of the orig. debtor. for here it is apparent the jury did not intend to give the orig. demand. 2 SR 129. 2 Wils 299.

But

Escapes 3

Sheriff.

Suit by the Plff being Debt.
of the Sheff. the jury must give the whole debt
including the costs of the orig. action. Undersheff
recovery is a bar to Plffs claim agt the orig.
deft. 2 Bl. R 1048. Esp. D 609. 2 SR 126. 129. 132.

2. Prin. on which the rule of damages is here based
rested, is that when an act. of Debt is brot, the
sheff is considered as the debtor. the whole debt
being by operation of law transferd to him.

Our Statutes vary in this
from as construed in Mass. Ser. Ab. that when
the sole escape is from prison whether on mesne
or final process. & whatever may be the form
of the act. agt the sheff. the Plff shall recover
the whole amount of damages. Lawrence &
Whitney vs. Lord. Litt Con 222. 336.

If a prisoner ar-
rested on mesne process is rescued before com-
mitment the sheff. is excused, tho' if rescue
is no excuse for an escape on final process.
The reason for this given in the books is evasive
& contrary, it is, that the sheff ought to have taken
with him sufficient force to guard against rescue
but this reason is as applicable to the one
case as the other, - no rule to an escape on mesne
or on final process. & agt it was said, that in
case of an arrest on final proc. the sheff. ought
first to have a sufficient time to raise the posse
comitatus - but this reason is not better than the
former. - the rule however is well settled. Cas.

Cro E 693. Cro J 419. 3 Bl 416. Esp D 610.

But if the person
arrested even on mesne process is committed to prison, the rescue is no excuse unless it be by a pub. enemy, a rescue by domestic enemies is no excuse for the presumption is that there is no power except that of the a pub. enemy which is greater than that of the sh'ff.

The rule is the same as to a rescue on final process, a letter of attorney made before or after commitment to the former will be no excuse for the sh'ff as bound to have the prisoner there. & it is presumed to be law in a situation, where a pris. can defend it if necessary can be immediately raised but this is not supposed to be the case in this casual situation about the county 1 Roll R 66 2. 1 Co. 94a. Esh. D 610. Moor 482.

In cases of Rescue, when the sh'ff is liable, the sh'ff may at his election sue either the sh'ff, or the rescuer, but the bringing the act vs the rescuer accords to Esp. waive the act vs the sh'ff — the rule seems to be unreasonable & against the principles of law, but it is so settled, & the dictum Esp. is not to be considered as one. Esh D 610. 6 Co. 54. 6 Mod 211. Mod. 95. 4 Bac 399. Cro E 693. & 109. I will not discuss this question but one reason in support of the rule is, that it will be impossible in reasonable for the sh'ff after bailing the sh'ff taken, & preserving him in the state for some time, then to bring an act vs the sh'ff — for the sh'ff might in the mean

Escapes } mean-time have taken measures to secure himself

It is said that here the Plff may bring either an act. of trespass or of case, but I cannot see how that can be the case on pain. — for two Plff actions cannot lie but for the same offence; & it is here clear that the act. of Trespass lies, for there is no evidence to support that. It is merely for consequential damages. But the rule is different Bac Abr 180. Esp 446. 4 Bac 999.

The act. may be maintained by the orig. Plff against the escapee, whether the arrest was on final or mesne process, & if on final process it may also be maintained against the Plff but not if on mesne process. the person not having been committed. Esp 446. Bac Abr 180. Burr 995. Bnd. C. 105. & 96.

In an act. against escapee the jury may give either the whole or a part of Plff orig. demand, if they give only a part Plff may still proceed against the orig. Deft or better to enforce his claim 6 Mod 211. Esp. 657, 659.

In an act. by Plff for an escape on mesne process, his claim upon the back of a note, is conclusive evidence in his own favour, i.e. it cannot be rebutted. Tho' a subsequent entry may be brot. for the false return, & if the return be proved false, Plff may recover the whole of his claim or demand against orig. Deft. Bnd. C. 98. Bnd 295. 1 Burr 224. 2 Bl 1175. The reason of this rule may not

officer else. But it is that every officer who commands a falsifier when they arise in the course of a suit commenced for a different purpose, nor can they be falsified in any way unless they be put directly in issue. The act for the remedy does not

If the reasons in issue, neither should the sheriff be drawn unexpectedly put upon his defence, but in an act for the false return the reasons are put immediately in issue

It is also a rule that the sheriff may have an act of best. on the case, as to reasons. A sheriff cannot be has this right only in those cases in which he is liable over to the sheriff in the first. & he may do it only to indemnify himself. can return a final Inst. Bro Ent. 99. 109. Burt 9 v. Bol 180.

If the sheriff brings into prison an absent def. on a ca. sa. a rescue is no excuse for him. The reason in this case is the same the strongest than that of a rescue on final process. for in case of a hab. corp. he can always command a sufficient force to protect his prisoner in case of an arrest on final process, may not always be at command in the usual situations about the county Sha 402. Esh 2616.

After person arrested & rescue, escape is committed, nothing short of the act of God or the pub. enemy, will excuse the sheriff for an escape. But in case of bail for good cause, the

Bracken. Pleasure &c the prisoners being all but coze, it became necessary for pltff to indemnify the sheriff. for they were liable for all the escapes in case of the prisoners taking fire, the liability of the sheriff is not discharged unless it is in case occasioned by agitating 4 Co 54a. 2 Str 1113. 1 Str 389. Exch D 510. 2 Ba 247.

Diversities between the consequences of Voluntary & Negligent Escapes.

Lessee formerly holden that in case of a voluntary escape the prisoner was discharged forever from the Demand pltff had agt him, & the entire liability was transferred to the sheriff, but this is not law now. The modern decisions are to the contra. Indeed this rule seemed somewhat vindictive & was intended for the punishment of sheriff. but it surely was enjoined to obtain the diligence of his election either to pursue the orig Defendt. — but the rule is now well settled 1 Ro 202. 209. 2 Ba 209. And pltff now may according to the circumstances of the case have either an action of Debt agt orig Defdt. or by a sci. fa. on exon on the orig judgt. or now by St 4 & 5 Wm & M pltff may obtain a new execution on the orig judgt without a sci. fa. or he may retake the party escaped on the orig execution as at C.L. — So that the Law now seems to be very much altered from what it once was. 1 Ba 196. Vol 50. 1 Lid 330. 2 Mod 136. 1 Vent 4. 269. 3 Keb 415. Exch D 511. B.N.P. 69.

And when there is a voluntary escape of one com-

committed on mesne process, the Plff may waive the tort & escaping by what is called an escape warrant 3 Bos & P. 525. 2 Wils 295. Esh. D 611.

But the Plff suffering a mesne escape can never assume state the party escaping, or maintain an action against him for escaping, he himself being subject to the remedies above mentioned only in favour of the Plff & not of the Pff. 3 Bos & Pul 525. 3 Bos 52. 1 Lid 330. 2 Bl R 1176.

And if an Offr after having limited a mesne escape, and thereon & retaken the party he would be guilty of false imprisonment, — for he acts without any of law having suspended his use by suffering the escape 1 Went 269. Carter 210. 1 Bl R. 176.

And a bond or other contract to save the Plff harmless upon a mesne escape is void as being against law, for it stipulates for the commission of an offence. It is void upon the same principle as a bond of indemnity for a murder. 1 Bos & P. 1 Pul & P. 213. 10 Bos 101.

And the Plff in the process may retake the party escaping, even tho he has sued & recovered a part of the debt due on the mesne process of the Plff. But not if he has recovered the whole; for then the amount is not to be deemed the actual damage 3 B. & P. 69. Esh. D 611.

But when the escape is negligent the Plff may retake & have an action

action the party [illegible] & that immediately, & before he himself is escaped even and for the escape, for then himself liable to the [illegible] from the moment of the escape. For the wrong doer has no right to claim that [illegible] first be subjected before he (the [illegible]) shd be rendered liable Esp 834.53. 360. 526. 1 Ba 456 Esp D 612-3.

If a debt has been taken by the sheriff to indemnify him agt a negligent escape he may take the remedy on that bond, for here he is not bound to minister. Root 157.

Does the sheriff bailiff commit a C. L. when an action agt. the party escapes even tho he (the bailiff) has been sued to the sheriff himself for he is not at law liable to the sheriff, nor is he to the sheriff except by means of his contract he not being a public officer. But the contract between the sheriff & his subordinate officers affect the rights of the party as such. The intention of the bailiff the essence to be sued but it is not so in Brad. for he may commence action agt the party escaped in the name of the sheriff, & of right shd secure him the use of his name. Ch will compel him to do the same being given Esp 3, 249. Esp D 613.

So Conn it has been determined that when a prisoner escapes out of one state into another, he may be retaken by virtue of one state warrant 1 Root 107. and this State to be appealed to herein, & to the analagous cases of bail being so taken, as is decided in N J & Con. 4 Johns. Con. L.

If a felon arrests on a civil process escapes. he is punishable for the escape to fine & imprisonment. & if he escapes by means of prison breach he is punishable as a felon. This by common consent has gone into desuetude in this state. the cases of prison breach on common Law Election the rule is not to be retained, or considered in force in any of the States 4 Bl 129. 130. 2 Haw 122. 128.

If a Sheriff has arrested a felon, suffers a negligent escape, he is guilty of a misdemeanour & is punishable by fine - but if the escapes voluntary he is guilty of felony as an accessary after the fact, & so punishable privately as the felon himself 4 Bl 130. 1 Black 599. 2 Haw 134.

When a sheriff has been compelled for negligence to pay the debt or damages to plff in the process he may maintain an action of debt upon a promise against the original debtor for money had & received for his use - And indeed it is a general rule of law, that when an individual is compelled to pay money, which another ought to pay, the former may recover of the latter in debt.

The same thing has been twice decided at N.P. in Eng when the sheriff had been negligent for a mere escape. But Lord Kenyon denied the general Law. Esp. D. 572. Peake Ca 144. Selw. N.P. 358. 154 to 156.

Vol. 2 Neg. Escape.

In case of neg. escape if the off. retake the prisoner on fresh suit before an act. is brot. ag. himself, he is discharged of his liability. The words "fresh suit" seem to be wholly negatory, tho' they are always used for it is now settled that any retaking on any process before the act. brot. ag. the off. is a nullity. Thus 908. 3 Co. 14. 52. Plowd. 21 & 217 1 Roll. 106. 2 SR 126. Cap. 2 611.

But if the act. for the escape is brot. ag. the off. before recaption, & subsequent recaption does not discharge him for the off. by commencing the act. & during the entanglement has attached a right of act. in him, & the right on the gent. parts, cannot be defeated by any act of the off. The writing by compare of the parties or stand act of off. Cro E 637. Thus 873. 3 Co. 14. 52. 1 Rol. Ab. 808.

But if the off. be lost in custody before the commencement of the custody of the off. it seems not to be material by what last means he came again into that custody, the off. shd be discharged. Because it shews the mind that a not return of the prisoner was on off. Cro E 554. 2 SR 126. 1 Bac Ab 413.

In case of a voluntary escape on the other hand, a recaption is no excuse for the off. for there is no right of recaption in him (tho' there is in the off.) & if he retake him it will be false imprisonment.

& This for the same reason that he cant maintain an act. agt him, he being punishable criminis 3 Co 52 b. Cap. D 611-2. And then a note is in the Judge or night of custody one returnable abandoned or suspended is absolute for ever & this Judge of the prison is in that respect precisely like a Judge of a Com Pleas & the return of the escape does not at all avail the Sheff. for the night of act. agt him is complete from the moment of the escape took place 2 Wils 294. Salk 271. Cap D 612.

I have observed that after a negligent escape the Sheff or Gaoler has a right to retake the prisoner. But this is not the case if the Sheff in the first having the endorsement discharges the debt of the debt & damages claimed. They cannot retake him for their own fees, this if he had not escaped, he might have been retained, — this is founded upon the ground that the Sheff by his own neglig. upon the person through his own neglig. Stra 905. Cap D 611.

When a person who has the custody of the prison goes escapes. a retaking, or not return of the prisoner, solves the Sheff from all of the actions & actions that lies after the act. is not agt the Sheff. Still however if the Sheff had taken a bond of indemnity he may maintain an act. on that bond altho he is not liable to the Sheff. for there the bond is forfeited broken, that

Def't may escape & the writ will cover only nominal damages. 1 Root 106. 7. 127.

The Plff however such can may insist on taking substantial damages of the land-mar in recovering the whole amount of debt & damages. — This he may do by refusing to the sheriff to do the indorsement on the return. 1 Root 125.

When the Plff's action ag't the Plff for the escape is barred by the 1 Yr Limitations. Plff cannot recover the full damages — because he is not himself liable. 1 Root 151.

In suing Plff for an escape it is an established rule, that under a count upon a vol. escape Plff may give in evid.ce any escape & the evid.ce will support the Def.ts or count. It follows then that the counsel are for Plff to plead a retaking &c. to such a count without traversing the vol escape, — as the retaking is no excuse for a vol escape. There is no inconsistency in this, tho' it may at first appear so. It goes on the ground that it is unnecessary for an Lawyer like to allege in the Def.ts plea that the escape is not vol. or neg.t & Judge Hall says to allege what the esc. was vol. or neg. is like both to leave you room to the matter. Indeed in the Def.ts nothing need be alleged but the escape, & if this plea of a retaking &c. (which is a good plea to a neg. esc.) the Plff omits to reply, & in his rep.n he a novel assignment. 1 Root

1 Salk 211. 2 Ld. 2 Ba 246. 2 Salk 196. the rule is well settled.

I have observed above that per a release. the aff.ts who permits a debt to be lost as well as the sheriff. If the sheriff proceeds agt the deputy or under sheriff. the sheriff is discharged. This rule is laid down by Cah. whose resolutions not is not considered very good law but this rule & reason is founded upon principle Cah. D 672.

If after an action brot agt a sheriff for an escape & before plea pleaded, the orig judgt agt the arg (escapee) is reversed, the sheriff may defeat the action brot agt him self by pleading the record. the plea is good because the orig judgt is now annihilated & the deft in the precip ne be now in execution & be entitled to the discharge

But if after judgt & execution reversed agt the sheriff the orig judgt is reversed. that agt the sheriff is good for it is no more than the fine of the record. In such case the sheriff ought not to recover agt the debtor. the sheriff has his remedy by a writ of audita querela after the execution is sued, shewing the matter & short facts. & that it was unreasonable & unlawful for the sheriff to answer. 2 Co 142 b. Hale 209. 2 Ba 246. 3 Mod 325.

A Bail exc. sometimes a forfeiture of the office of the sheriff or Gaoler who permits it. But a neg. exc. does not. because the former is an offence. but the latter is but a mere civil wrong. Sal 274. 3 Lev 288. 2 Ld. 81. 3 Mod 146. 2 Ba 246.

False Returns &c by the sheriff

certain Miscellaneous Rules -

If a sheff makes a false return on a process, he is liable in an act? of this. on the case, by the party injured by the false return. as, if he make a return of service upon a deft when he has made none & all the damages may be recovered in the act?
1 Wils 336. Esp. D 616.

In Con a false return may be falsified by deft by a plea in abatement, & thus defeat the act? - this can be done at Rl. but then an act? must be brot for the purpose It follows then in Con. that as the act? is thus defeated, the sheff may have an act? of the case for the wrong & recover the damages arising from the loss of the orig! act?

By both the C.L & our own, if a sheff makes a false return immediately disadvantageous to the plff, as by returning non est inventus, he may have his act? at the case. This false return of non est inventus is injurious only to the plff, tho' in real fact return is as injurious any to the deft - Cro E 729. 1 Sho. 660. Esp D 616.

With regard to the support of Gaols - The sheff is by office keeper of the Gaol & by the C.L it is his duty to provide & keep them in repair, & he is to be reimbursed by the county. If it be for an escape to the fault of the sheriff & of the prison, the sheff shall be

16 Pet. 1 Root 408. Thr 482. Ex. D 514.

In Con. on the other hand parts of Counties are joined immediately by the county — & it is the duty of the Officers & Justices of the Peace of the county, to levy a tax, on the county & build one jail & Prison. & this tax must be collected by collectors appointed by the Co. Ct. It follows then, that for an escape from the custody of the goal, the county not the Sheriff is liable. But if the escape was facilitated by the misconduct of Sheriff, he doubtless would be liable. St Con 220. 223. 1 Root 458.

Remedy agt. the county under our Law is sought by a memorial or petition to the Co. Ct. — an action at law will not lie. But as the Co. Ct. is supposed to be interested in the affairs of the county, the party aggrieving has a right of appeal to the Sup. Ct. St Con 367. 1 Root 156. 155. 275. 278. 367. 450. 505. 511. 30.

But by a course of decisions heretofore had the validity of the county is merely nominal, but I presume these decisions cannot continue to stand for ever. — It has been determined, that if the party escaped is still able to pay, the Sheriff will pursue his remedy agt. him. & if not able to pay, why then the fine can not be paid by the request of the county, & therefore shall recover only special damages Ver 316. 1 Root 125. 156. 278. 357. 505. I cannot see the principle on which this doctrine is founded, for

Privileged Rules for as the liability of the sheriff is transferred to the county, it and the sheriff be liable.

But if the party at the time of execution may abide by & pay, & thus avoided the claim by means of the escape, the county I think shd be discharged upon the old principle.

And the prisoner was arrested by an outstanding fine — the prisoner being of sufficient strength — the county is not liable — the Sheriff is more upon the other. 2 Root 195.

If a Ct. voluntarily discharge from custody a prisoner taken on exn. he can never afterwards retake, or in any way enforce the judgt. against him, & while holds where he has been authorized committed or not. & it seems to be founded on the artificial reason that the body being taken & held on exn. is for the time being a satisfaction of the debt, & the Sheriff thus having elected his legal remedy must abide by it, & as the discharge of the prisoner is the discharge of the claim in toto. 4 Burr 2482. 1 DR 567. 6 id 525. 7 id 420. 8 id 143. Sha 622. 633.

And that the Sheff in pt exn. did discharge the debt in consideration of a new engagement to pay. The judgt debt & this new engagement is not fulfilled. Sheff cannot retake the debt, nor maintain debt on judgt or in any way enforce

enforce the judg.t, tho he may maintain this act.n upon the new engag.t for he had a right to discharge the debt upon such condition of the Deed. But remains a sufficient consid.n to support the act.n — but not a discharge by the Sheriff and enable him to an action. 4 Burr 2461. 1 Bl R 557. 5 id 525. 7 id 420. 2 East 243.

But the judg.t will remain discharged even tho the new engagement shd afterwards be defeated from informality — this will save the Sheriff remediless. 1 Bl R 557. 5 id 525.

A bond conditioned to render ag.t in exec.n a person who had been once taken upon it, & upon the bond discharged by Sheriff, void, as being ag.t law, for it is a bond to compell a false imprisonment, as a Judge once abandoned is abandoned forever. So tho' a bond has been decided to be good, but it is ag.t law. 2 Bl R 842. 2 East 243. 2 Mod 133.

If two joint debtors are taken in Ex.n & one of them is discharged or released by the Sheriff the other is entitled to his release & may obtain it on a hab. corp. — this is upon the principle that the discharge of one taken in exec.n is a discharge of the debt. For in this case, as each is liable to pay the whole debt, the discharge of one is the discharge of the whole debt, so that nothing remains for which to hold the sec.d altho.gh Sal 574. Lord Ray

Miscell. Rules 2 Kay 690. Cro E. 551. 1 Full. 93.

But a joint & several Debtor

Exr. may be Holden of a bill or note, after he has taken one Indorsee his exr. & discharged him he may take another, or the Drawer or maker, or another & discharge them in succession, for they are not joint or joint & several Debtors but are bound distinctly severally & independently by separate covenants 1 Ld R 1295. 45. R 825. Chit B 115. 124.

It was formerly decided in Eng. if a sole debt imprisoned an exr. died in prison the debt was forever discharged. This was bad. by on the ground that plff having elected his highest remedy must abide by it, & party on a grant after. of some inferior one. 2 Ba 354. Kel 62. Cro E 850. Cro J. 135. 143.

But if one of two joint debtors is imprisoned died, it never was supposed to be discharged as to the other 5 Co 86. Cro E. 850. Cro J 135. 143.

and now by Sts 2 & 1 Jas 1. the language of which seems to be declaratory - it is provided that when a sole debt dies in prison it shall not discharge the debt. & plff may sue out a new exn. ag. debts estate as if there had been no prior one. Do this amounts to a Legislative exhibition of the C.L. in conformity to the former rule laid down above see Lk 2 Ba 354.

A feoffment made to plff by persons

prisoner conditioned to remain a true prisoner
until the debt, fees & expenses of board be paid,
is wholly void as being ag[t] the Act of 24 Geo 3. Wh provides That a bond by prisoner
for any other purpose than that shall remain
a true prisoner is void. The object of this Act is
to prevent all speculating & profits upon
their prisoners; If the bond is taken only
to indemnify him ag[t] an escape &c it is
good. but when this is incorporated with
other things wh are illegal the whole bond
is void. & not that part of it only wh was illegal
as has been held in Con. 1 Dall 237. 1 Dall 173.
1 Dall 195. 10 Co 100. Plow 66. Doug 14. 2 Wils 351. con-
tra 1 Root 158. 4 Bac 61.

By the way I doubt very much whether it
did not be consistent with Spirit & Policy in
Con. & indeed in all the other States where the
bond may be chancered, to consider it as good.
for the only reason of the bond being declared
void by the St. 23 Geo. was in consequence of the
penalty not extending on a Contempt of Extortion
& the like. — but where the bond can be chancer-
ed, it is nothing more than a single bill &
a single bill in Eq[y] for fees & costs, and
is held good.

Eq[y] Jurisdiction in Con. 2 to Jacob.

which includes
wills and proves to the C. K. Clerk Prem[s]

Com. St. Regul. 17 Jurnine That at C.L. all persons committed to prison are bound to support themselves & are by the Statutes of Colonies who are exempted because they are deemed incapable of supporting themselves their estates being all forfeited by the crimes for which they were attainted. 1 Show 66. 1 Mod 132. 12 it 683.

By our law a person committed for any offence is obliged to support himself during his confinement, if of ability, & his estate is subjected to this purpose & if he has no estate he may be obliged in service until it is paid. But in criminal cases, the expences in the first instance are paid out of the State or town treasury & then the state or town must recover per its indemnity by this ext. for the party shall not be bound to find up the prisoners ext. & then after the case may be suffer the a law must recover it. Lt Con. 283. 365-6.

2 It being of more than lawful fees of the prisoner subject to forfeiture & liable damages at the suit of the party & to a fine at the discretion of the C. C. P. Lt Con 291. 3.65.

But this by C.L. every one committed is obliged to pay his own expences. still there is no way to recover the Lords rent, and a similar one of our towns, all make provision

provision for those committed on civil process & are unable to support themselves. - The Law is a late one & I believe to most of the U. S. does not at all concern us.

An Insolvent is obliged to support himself until he is admitted to what is called the Poor Prisoners or Debtors oath. - In this is the only legal evidence of his inability that I have, & the amount of the oath is that he has no estate of the value of £5 or that he is unable to pay the debt for which he was imprisoned, if more than that £5. & has not conveyed it away to defraud the creditors, - except such part as by law is exempted. On taking this oath he is to be discharged under the Insolvent Prisoners a weekly allowance to be lodged in the hands of the Gaoler, the amount of which is to be adjusted by the Co. Ct. of Litt. Con 165. 1 Root 117.

But the person thus admitted to the oath & discharged by his Creditr is liable for the expenses of his maintenance if he is found to have any Estate at the time or ever afterwards acquires any. & for this Creditr may have an exec. without a writ fa. 1 Root 156.

When he is once discharged for want of estate, his body can never afterwards be taken for the same debt.

Any single magistrate being satisfied that the Prisoner does not Escape may administer the

Con Lb. 3 the oath of no objections is made to
Con 365.

If the Prisoners application is unsuccessful, he cannot make another applic.n to any single magistrate, but he must make it either to the Ch. J. of y.e Co. Ct. & a justice of peace, or to two justices of the peace & thus obtain a review of the first decision. & if the Prisoner was unsuccessful in the first applic.n the Ct.d.r may obtain a review before the same auc, & their decision is final. Lb Con 365-6.

This Statute further
provides that debtors & felons are not to be lodged
in the same room

When any one County is destitute of a Prison, any person liable to imprisonment may be committed to the gaol of the adjoining county. Lb Con 366.

Par. 2d Section
Co. Cts. have auc to order to the walls of the Prison every person committed on Exec.n for debt, damages, fine, or costs, after the exec.n was issued by the Sup.r Ct. in wh case to surrender to the same auc, & the sheriff is bound to obey this order when given, tho I have never known an instance of it's being given, & if he does not obey he is liable to a motion made, altho the Prisoner does not escape, but remains with the Prison yard. This provision of the St extends only to those cases in wh the judgt on wh Prisoner was committed was
for $ Lb Con 365.

Finis.—